INDEX.

	Page
THE NEWBURYPORT CASE. [No. 182.]	
Statement.	1
Jurisdictional facts.	1
Facts relating to time of taking and entering appeal.	2
General statement of plaintiff's grievance under the provision of the Fourteenth Amendment relating to "Due Process of Law."	2
Statement of the case.	3
History of the Newburyport case.	10
"The Constitutional Question heard separately by the Circuit Court."	11
The questions involved in the Newburyport case.	13
Specification of errors.	16
THE GLOUCESTER CASE. [No. 183.]	
Statement.	20
Jurisdictional facts.	20
Facts relating to time of taking and entering appeal.	20
General statement of plaintiff's grievance under the provision of the Fourteenth Amendment relating to "Due Process of Law."	21
History of the legislation involved, as shown in plaintiff's bill.	22
Proceedings before commissioners and in the state court.	25
Questions presented by plaintiff's bill and the demurrer thereto.	28
The questions herein presented.	30
Specification of errors.	33

THE NEWBURYPORT CASE.

	Page
Argument.	36
Jurisdiction.	36
The Circuit Court had jurisdiction. . .	36
The appeal was properly made directly from the Circuit Court to the Supreme Court. .	44
The appeal was seasonably taken and entered	44
Concerning special grounds alleged by defendant as barring plaintiff's right to be heard on the merits.	46
The questions presented under the demurrer were disposed of in the opinion of the court thereon adversely to the plaintiff. . .	47
As to defendant's claim that complainant, by its bill, seeks to undo and reverse what was done in the state court.	49
As to defendant's claim that plaintiff, by proceeding before the commissioners and in the state court under the act of 1894, waived its right to question the constitutionality of the statute.	50
Where the federal and state courts have concurrent jurisdiction (1) a party litigant loses no rights by bringing his suit in the federal court; and (2) the federal court will apply to the case "the same principles, and its determination is governed by the same considerations, as if it had been brought in the proper state tribunal of the same locality."	50
Electric Co. v. *Dow*, 166 U.S. 489. . .	52
It is clear that under *Moore* v. *Sanford*, 151 Mass. 285, plaintiff was not estopped to try, in a different suit brought after it had invoked the statute of 1894, the constitu-	

Page

tionality of that statute; and that under *Electric Co.* v. *Dow* it is equally clear that the federal courts will follow the Massachusetts rule in this respect. . . 53

As to defendant's claim that plaintiff is estopped by its deed, and that the plaintiff, by making the sale and deed under the statute, waived its right to question the constitutionality of the statute. 53–54

As to the claim which defendant may make that the statute of 1894 was solicited and procured by the Water Company. . . 55

As to the attempted defence of *laches*. . . 57

Argument concerning the alleged violation of the Fourteenth Amendment. 57

The question under the Fourteenth Amendment was and is whether the plaintiff was deprived by the state of its property without due process of law. 57

Preliminary. 57

We may resort to the opinions of the court below to show "the grounds upon which the court below proceeded." 57

The Circuit Court held that "The plaintiff's whole position hinges on the question of compulsion" (R. 123); and that the "crucial point" in determining that question was whether the statutory threat of municipal competition "produced compulsion which amounted to duress." . . . 58

I.

"Due process of law," under the Fourteenth Amendment, requires compensation to be made or secured to the owner of private

Page

property taken under the authority of the state for public use.

This provision controls a taking, whatever may be its form or guise. 59–60

II.

As to what constitutes a taking under the Fourteenth Amendment.

Whatever the provisions of the state statute, we are entitled to go behind the form and to show that what was authorized by the statute, as construed by the state court, was, in effect or in substance, a taking of plaintiff's property without compensation, under the form or guise of a sale which was apparently voluntary, but which was in reality compulsory in fact and in law. . 62

III.

It is not only settled, as above shown (II.), that the owner of private property may be deprived of it by state action in any form which is in effect or in substance a taking thereof; but it is also settled that a sale which is compulsory in law under a state statute is the equivalent of a taking by the state. 67

IV.

It results from the three preceding points that due process of law under the Fourteenth Amendment requires compensation to be paid or secured to the owner of private property sold to a municipal corporation for public use by a sale which, as regards such owner, is compulsory in law under the state statute which authorizes such sale. 68

Page

V.

As to what constitutes legal compulsion, and especially compulsion by a government or its officers; and as to the kind of compulsion which constitutes duress, and renders involuntary in law (as well as in fact) what appears to be voluntary.

While ordinarily what may be lawfully done may be lawfully threatened, yet if the government, or an officer of the government acting under color of office, threatens an individual with serious loss, unless the individual will make a contract to do something not required by law, and if the contract is made under the influence of such threat, such contract, though voluntary in appearance, becomes thereby compulsory in fact and in law, and is obtained by duress. 68–69

As to threats made by an individual. . . 71

Contracts may be avoided which are "obtained by the threat of unquestionably legal acts." 71

Silsbee v. *Webber*, 171 Mass. at page 381. . 71

The same opinion recognizes that "ordinarily, what you may do without liability you may threaten to do without liability. . 71

Further authority showing when it is unlawful for an individual to threaten what it would be lawful simply to do. 72

As to threats made by a government, or its officers acting under color of office. . 72

The Circuit Court, while it uses the term, "threatened illegal act or exaction," yet fails to note that there is a distinction between the threat and the exaction. . 74

Page

The Tingey case (*United States* v. *Tingey*, 5 Pet. 115). 74

We claim and submit that a careful examination of this case, and an application of it to the present cases, will show the fundamental error of the Circuit Court in its conclusion that, although the sale in the present case was compulsory in fact, it was not compulsory in law. . . . 74

For the conclusion reached in the Tingey case by the present court is that a threat made by an officer of the government under color of his office, which in itself would be a lawful threat, *when coupled with an exaction which is variant from what is required by law*, makes the contract entered into under influence of such threat *compulsory in law* as well as in fact. . 75

Analysis of the Tingey case. 76

The Tingey case cited and approved in subsequent authorities. 80

The Tingey case was deliberately adopted as law by the Supreme Judicial Court of Massachusetts in 1851 in *Boston* v. *Capen*, 7 Cush. 116, at page 124; see pages 123–125. 81

We submit that it is established under the above authorities that the Circuit Court was in error at the crucial point of its own argument; and that its conclusions there *should have been* as follows: —

That while "*ordinarily* what may be lawfully done may be lawfully threatened," yet if the government, or an officer of a government, acting under "color of office," threatens an individual with serious loss

Page

unless the individual will make a contract to give or do something not required by law, and if the contract is made under the influence of such threat, "there is no pretence then to say it was a [contract] voluntarily given;" but such contract is compulsory in fact and *in law*, and is obtained by *duress*. 82

Johnson v. *Reed*, 136 Mass. 421 (formerly cited for defendant), furnishes an analogy directly in support of our above claim and argument as to the scope and effect of the Tingey case. 84

VI.

Application of the foregoing principles of law to the present case.

A.

The government, that is, in this case, the commonwealth of Massachusetts, by the act of 1894 (c. 474), in effect threatened the plaintiff with serious loss unless the plaintiff would, by an apparently voluntary sale and contract, do something not required by law.

B.

The plaintiff, under the influence of such threat, did what was required, as above, to wit, made the apparently voluntary sale provided for in the act of 1894, which sale included the disputed franchise rights for which plaintiff receives no compensation.

C.

The sale became thereby compulsory in law. . 85–86

[*We seek here to apply the law of Point V. to the facts of the present case, the compli-*

Page

cations of which necessitated full and careful treatment; and we earnestly beg that our argument hereunder will receive equally full and careful examination and consideration.]

We submit that we have established and sustained the *third, fourth, and fifth assignments of error.* 113

Anticipated defences to the foregoing. . . 114

Examination of cases heretofore cited by defendant upon duress, in anticipation that the same cases may be cited again. . . 115

VII.

That the company gave a deed which was voluntary in form is immaterial. The sale remains compulsory in fact and in law. . 119

VIII.

Such sale (which was compulsory in law) was for a public use of the property. . . 120

IX.

By such compulsory sale plaintiff's property was taken. 121

X.

The property of plaintiff was taken under color of the authority of the state or commonwealth of Massachusetts. . . . 124

XI.

The plaintiff, a private corporation, is a "person" within the Fourteenth Amendment. . 128

XII.

It results from the preceding points that the plaintiff has been deprived of its property by the state or commonwealth of Massachusetts without due process of law.

Page

The errors specified in the first, second, sixth, and tenth assignments of error (*post*, pp. 129–130) are shown, and the decree of the Circuit Court should be reversed. . . 128

XIII.

The provisions of the act of 1894 (including the act of 1893 as re-enacted by the act of 1894) constitute an "entirety." The part of the act of 1894 which we have shown to be unconstitutional cannot be separated from the remainder without violating the obvious intent of the statute; the entire act of 1894 (including the act of 1893, as re-enacted by the act of 1894) is therefore unconstitutional and void. . . . 130

As the City of Newburyport holds plaintiff's property under a statute which is unconstitutional and void, this court of equity should give such relief as is usually given to owners of property against other parties wrongfully in possession of the same. . 131

That an unconstitutional act is void, and protects nobody who has meddled with property under it, whether he be a private individual or an agent of the government, is elementary constitutional law. . . 134

XIV.

As to defendant's claim of laches. . . . 134

Defendant's claims under this head considered *seriatim*. 136

XV.

The specific relief which may be finally granted need not be determined now. It is sufficient at present to show that we may

Page

be entitled to any final relief in respect of the property in issue. We have shown that the entire act of 1894 is unconstitutional; that all action thereunder is void. The entire compulsory sale thereunder was void. The deed thereunder was obtained by compulsion. And under the principles of equity we are entitled at least to a cancellation of the deed and a restoration of the property. 141

XVI.

As the sale was compulsory in fact and in law, the statute was in violation of the Fourteenth Amendment, even if the franchise rights were not, under the statute, included in the sale. 142

The argument concerning plaintiff's claim under the clause of the Constitution relating to the obligation of contracts. 142

Preliminary. 144

The contract to supply the City of Newburyport with water for fire purposes. . . . 148

THE PRELIMINARY QUESTIONS.

First.

That the testimony of the commissioners set forth in the stipulation is competent. . 150

Second.

The testimony of the commissioners was admissible at that stage of the case. . . . 153

Third.

The evidence offered by plaintiff under the stipulation is material. 157

Page

Plaintiff's reply to certain cases cited by defendant to the Circuit Court against the admissibility of said testimony. . . 158

ARGUMENT UPON THE MERITS.

I.

Plaintiff and defendant made, under the authority of the state, an exclusive contract for the City's water supply for fire purposes during the continuance of the contract, and not exceeding twenty years. And when the statutes of 1893 and 1894 were enacted, the contract had several years yet to run. 168

A. This contract for a full supply of water for fire purposes was *expressly exclusive*, because it provided that the Company should at all times during the term of the contract furnish "a full supply of water for fire purposes." 169

B. The exclusiveness of the contract, during its limited term, was an *incident* of the statutory power to make the contract; because —

1. The exclusiveness would not lead to a monopoly as against the City; because

(*a*) The term of the contract was limited.

(*b*) The City had "the right at any time after ten years from the date of the completion of said works to purchase the corporate property and all rights and privileges of said company." . 173

2. The power to make such exclusive contract was given to the parties by the act of 1880. 176

Page

Examination of United States Supreme Court cases cited for defendant (in an earlier brief) upon the question of the exclusiveness of the contract for water for fire purposes. 177

Certain features of additional United States Supreme Court cases which the Circuit Court relied upon principally in its said opinion of August 8, 1900, upon the question of exclusiveness. 182

C. Said contract for the full supply of water for fire purposes was also exclusive by *necessary implication*. 185

II.

The act of 1894 as construed and applied did not provide compensation for the contract. 187

The law applicable to this case in respect to the impairment of the obligation of contracts. 187

First Proposition of Law.

The constitutional provision prohibiting the impairment of the obligation of contracts relates to and protects all contracts, express and implied. 187

Second Proposition of Law.

Any contract to supply water to a city "is a contract protected by the Constitution of the United States against state legislation to impair it." 188

Third Proposition of Law.

Where a municipal corporation — a city — makes, under legislative authority, a contract with a private corporation, giving the

17407

Page

latter the exclusive right to furnish such city with gas or water, any subsequent law passed by the state legislature authorizing such city to furnish itself, during the life of such contract, with gas or water, or to obtain the same from any third person or corporation, impairs the obligation of such contract; and is therefore unconstitutional and void. 189

Fourth Proposition of Law.

Any law which abridges, or in any manner changes, the intention of the parties resulting from the stipulations in the contract, necessarily impairs the obligation of such contract. *A fortiori*, a law which extinguishes or destroys a contract impairs the obligation of such contract. . . . 189

Fifth Proposition of Law.

Where a contract has been made under authority conferred by a state statute, any law which such state afterwards makes, and which interferes with or takes away the power of any party to such contract to perform its terms, impairs the obligation of such contract. 191

Sixth Proposition of Law.

In determining whether or not a statute is unconstitutional, the *direct and necessary result* of a statute must be taken into consideration when deciding as to its validity, even if that result is not in so many words either enacted or distinctly provided for. In whatever language a statute may be

Page

framed, its purpose must be determined by its *natural and reasonable effect*. . . 194

Seventh Proposition of Law.

The reserved power does not give to the state or the municipality the right to extinguish the contract, although by it the state may have the power to destroy the corporation 196

Application of the said principles of law to plaintiff's rights under the contract to furnish water for fire purposes. . . . 196

III.

If the act of 1893 was in force after the City voted not to purchase, said act impaired the obligation of plaintiff's said contract to furnish the state with a full supply of water for fire purposes during the life of said contract. 197

IV.

The act of 1894 (including the act of 1893 as revived and amended by the act of 1894) impaired the obligation of said contract, unless the plaintiff Company waived its constitutional rights by making a voluntary sale.

The sale was not voluntary; but was compulsory in fact and in law. 199

Municipal competition meant ruin, and ruin would have rendered the plaintiff Company unable to perform its part of the contract to furnish water for fire purposes, and would therefore have destroyed plaintiff's right to demand of the City the annual rental provided by the contract. . 200

Page

But the sale under the act of 1894, though voluntary in form and appearance, was compulsory in fact and in *law*. . . . 200

The argument upon the similar point under the Fourteenth Amendment is based upon the assumption that the threat of municipal competition, in and of itself, would have been a *lawful* threat. 201

We now show that **the threat of municipal competition, in and of itself, was unlawful**; because it violated the obligation of plaintiff's contract with the City, which had been made under the authorization of the state. 201

Wherefore we claim and submit that the act of 1894 (including the act of 1893 as revived and amended by the act of 1894) impaired the obligation of said contract. . . 204

We submit the above conclusion is not changed by the decision or reasoning in the recent case of *Joplin* v. *South West Missouri Light Co.*, 24 U.S. Supreme Court Reporter (part No. 2), p. 43, decided November 16, 1903. 204

V.

Plaintiff was entitled to act upon the threat; the law does not compel the victim to wait until ruin overtakes him and then leave him to resort to a court of law for damages; but he is entitled to relief in equity. . . 207

VI.

1. Although we have only argued under the contract clause of the Constitution that the provisions in the said acts of 1893 and 1894, authorizing the city to furnish itself with

Page

water for fire purposes is unconstitutional, it follows that said entire acts were unconstitutional and void.

2. The specific relief which may be finally granted needs not to be determined now. It is sufficient at present to show that we may be entitled to any final relief in respect to the property in issue.

Under the principles of equity we are entitled at least to a cancellation of the deed and a restoration of the property. . . . 208

VII.

The state, like an individual, is estopped by contracts made by it or under its authority; and is estopped here by the authorized contract for water for fire purposes from taking any position tending to prevent the plaintiff from carrying out such contract. 209

As to attempted defences. 211

VIII.

As to the reserved power of Massachusetts over corporate franchises. 211

IX.

As to the police power. 221

THE GLOUCESTER CASE.

Jurisdiction. 230

Concerning special grounds alleged by defendant as barring plaintiff's right to be heard on the merits. 230

Concerning the alleged violation of the Fourteenth Amendment. 230

General statement of plaintiff's grievance under the provision of the Fourteenth Amendment relating to "due process of law." . . 230

Page

The main distinctions between the Newburyport and Gloucester cases. 231

Our argument in the Gloucester case is by reference to the corresponding points in our argument upon the Newburyport case, with such additions and changes as are required and permitted by the distinctions between the two cases. 234

I.

[Same as I., *ante*, p. 59.] 235

II.

[Same as II., *ante*, p. 62.] 235

III.

[Same as III., *ante*, p. 67.] 236

IV.

[Same as IV., *ante*, p. 68.] 236

V.

As to what constitutes legal compulsion, and especially compulsion by a government or its officers; and as to the kind of compulsion which constitutes duress, and renders involuntary in law (as well as in fact) what appears to be voluntary.

While ordinarily what may be lawfully done may be lawfully threatened, yet if the government, or an officer of the government acting under color of office, threatens an individual with serious loss unless the individual will make a contract to do something not required by law, and if the contract is made under the influence of such threat, such contract, though voluntary in

Page

appearance, becomes thereby compulsory in fact and in law, and is obtained by duress. 236

In addition to the argument upon the similar point (*ante*, pp. 68–72), note that a person may be punished heavily under the criminal laws of Massachusetts, who, in writing, threatens what, without threat, he could lawfully do, viz., cause the arrest of the guilty party. 236

Under this statute it was held that the offence may be committed in an endeavor to obtain only that which is justly due to the defendant. 237

Particular attention is called to the Circuit Court's inaccurate use of the cases examined by it upon this crucial point. . . 238–239

VI.

Application of the foregoing principles of law to the present case.

A.

The government, that is, in this case, the commonwealth of Massachusetts, by the act of 1895 (c. 451), in effect threatened the plaintiff with serious loss unless the plaintiff would by an apparently voluntary sale and contract do something not required by law.

B.

The plaintiff, under the influence of such threat, did what was required as above, to wit, made the apparently voluntary sale provided for in the act of 1895, which sale included the disputed franchise rights for which plaintiff receives no compensation.

Page

C.

The sale became thereby compulsory in law. 240

[*As under Point VI. in the index of the Newburyport case, we must beg again here that the court examine our argument under this point fully and carefully, and also note the distinctions between the two cases at this point.*]

We submit it follows that we have established and sustained the *third, fourth, and fifth assignments of error.* 251

Anticipated defences to the foregoing. . . 252

The state court's opinion that "the sale to the City was not obligatory on the Water Company," with the subsidiary statements that "the franchise of the Gloucester Water Supply Company was not an exclusive franchise," and that "the Company was given the option of selling its property to the City," — is not binding upon the present court, which, according to its own decisions, must construe the statute for itself. 252

VII.

That the Company filed with the city clerk of said City "a specification and description" of the property comprised in the sale is immaterial. The sale remains compulsory in fact and in law. 253

The form of the transfer in the Gloucester act tends to confirm our claim that the sale was obviously compulsory and was a taking by the state. 253

In the Gloucester act, although terms of *sale* are used, the transfer was to be made by

Page

operation of the statute alone, and **without a deed.** 254

This is all the more significant when we realize that the City would need a record title to the real estate, and that —

Under the laws of Massachusetts no deed can be recorded unless it contains a solemn acknowledgment before a justice of the peace or other magistrate that it was the *free* act and deed of the grantor. . . 254

VIII.

The sale, which was compulsory in law, was for a public use of the property. . . 257

IX.

By such compulsory sale plaintiff's property was taken. 257

See Point IX. under Newburyport case (*ante*, p. 121).

We submit that this point is strengthened and confirmed by the peculiar provision in the Gloucester statute transferring title without a deed. 257

X.

The property of plaintiff was taken under color of the authority of the state or commonwealth of Massachusetts. . . . 257

XI.

The plaintiff, a private corporation, is a "person" within the Fourteenth Amendment. . 257

XII.

It results from the preceding points that the plaintiff has been deprived of its property by the state or commonwealth of Massachusetts without due process of law.

Page

The error specified in the first assignment of error (*post*, p. 259) is therefore shown, and the decree of the Circuit Court should be reversed. 257–258

We submit it follows that we have established and sustained the *first, second, and sixth assignments of error*. 258–259

XIII.

The provisions of the act of 1895 constitute an "entirety."

The part of the act which we have shown to be unconstitutional, cannot be separated from the remainder without violating the obvious intent of the statute.

The entire act is therefore unconstitutional and void. 259

XIV.

As to defendant's claim of laches. 259

XV.

The specific relief which may be finally granted need not be determined now. It is sufficient at present to show that we may be entitled to any final relief in respect of the property in issue. We have shown that the entire act of 1895 is unconstitutional; that all action thereunder is void. The entire compulsory sale thereunder was void. And under the principles of equity we are entitled at least to a restoration of the property and a decree in equity which shall remove the cloud upon plaintiff's title arising from filing such "specification," which might be held, by force of the peculiar

Page

provisions of the act of 1895, to be tantamount to a deed. 263
Law relating to demurrer. 264
We submit it follows that we have established and sustained the *twelfth, thirteenth, and fourteenth assignments of error*. . . . 266

XVI.

As to the decision of the Circuit Court sustaining the demurrer in the Gloucester case. . 266
Concerning plaintiff's claim under the clause of the Constitution relating to the obligation of contracts. 269
As to further anticipated defences. 271
As to the reserved power of Massachusetts over corporate franchises. 271
As to the police power. 271
In conclusion as to both cases. 272

INDEX TO APPENDIX.

Massachusetts Statutes relating to the Newburyport Water Company and the City of Newburyport:

		Record.	*Appendix.*
Exhibit A.	Acts of 1880, chap. 235 .	18	1
B.	Acts of 1878, chap. 240 .	22	6
C.	Acts of 1879, chap. 240 .	26	13
E.	Acts of 1893, chap. 471 .	28	13
H.	Acts of 1894, chap. 474 .	33	20

Massachusetts Statutes relating to the Gloucester Water Supply Company and the City of Gloucester:

Exhibit A.	Acts of 1881, chap. 167 .	19	22
B.	Acts of 1880, chap. 203 .	22	27
D.	Acts of 1887, chap. 288 .	27	30
K.	Acts of 1895, chap. 451 .	48	30

(Erroneously indexed in the record as page 40.)

Statutes relating to the Greenwood Case:

Greenwood v. *Freight Co.*, 105 U.S. 13.

Acts of 1872, chap. 342 . . .		39
Acts of 1867, chap. 170 . . .		42
Acts of 1869, chap. 461, sec. 5 . .		48

17413

[18,770. 18,771.]

Supreme Court of the United States.

OCTOBER TERM, 1903.

No. 182.

THE NEWBURYPORT WATER COMPANY,
APPELLANT,

v.

THE CITY OF NEWBURYPORT.

No. 183.

THE GLOUCESTER WATER SUPPLY COMPANY,
APPELLANT,

v.

THE CITY OF GLOUCESTER.

Brief for Appellant in Each Case.

The Newburyport Case. (No. 182.)

Statement.

Jurisdictional Facts.

The plaintiff (appellant) is a Massachusetts corporation established to supply water to the defendant, the City of Newburyport, a Massachusetts municipal corporation, and its inhabitants. (R. 1.)*

* For brevity, the references to the Transcript of Record of the Newburyport case are abbreviated to the above, *R. 1*.

The suit is of a civil nature, in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of $2000, to wit, more than $475,000. (R. 16.)

The suit is also one arising under the Constitution of the United States.

That it involved constitutional questions *ab initio* appears in the bill (R. 14, 15), where plaintiff claims violations of its rights under the Constitution of the United States, and particularly alleges the violation of article XIV. of the Amendments to the Constitution of the United States, and of plaintiff's rights thereunder, and the violation of section 10 of article I. of the Constitution of the United States and of plaintiff's rights thereunder. (R. 14, 15, and Amendment to Bill, R. 56, 57.)

Facts relating to Time of taking and entering Appeal.

The final decree, dismissing plaintiff's bill, was made and entered March 5, 1902. (R. 107, 131.)

The appeal to the present court was allowed and the bond approved and filed December 8, 1902. (R. 131.)

The assignment of errors was filed December 8, 1902. (R. 131.)

The appeal was entered and docketed in the Supreme Court of the United States January 2, 1903.

General Statement of Plaintiff's Grievance under the Provision of the Fourteenth Amendment relating to "Due Process of Law."

Plaintiff's grievance as to "due process of law" is, shortly stated, that, although the sale under chapter 474 of the Massachusetts acts of 1894 was *voluntary in form*, it was *compulsory in fact and in law;* that such compulsory sale constituted *in effect* a *taking* of plaintiff's property; that that statute, as construed by the Supreme Court of Massachusetts, provided for compensation for only *part*

of the property taken; that the part for which no compensation whatever was provided consisted of certain franchise rights which were of the value of more than $475,000; that the taking of such part of our property without compensation was in violation of plaintiff's rights under the Fourteenth Amendment to the Constitution of the United States, as hereinafter shown.

Statement of the Case.

In 1878 an act was passed by the legislature of Massachusetts (St. 1878, c. 240), authorizing the City of Newburyport to establish a system of water supply, which act required for its acceptance a two-thirds vote of the voters present and voting in said city. A vote was had thereon, but the City declined to accept the act.

After this action by the City, viz., in 1880, the legislature enacted chapter 235 of the acts of that year, incorporating the plaintiff corporation and authorizing it to furnish a water supply for the City and its inhabitants. (R. 18.) Section 11 of this act provided that the City should have the right, at any time after ten years from the completion of the works of the Company, to purchase the Company's property and all the rights and privileges of the Company at a price which might be mutually agreed upon between the Company and the City, and if the parties were unable to agree upon a price, then the same was to be determined by commissioners.

This act was accepted by the incorporators, and the Company proceeded forthwith to purchase and take the necessary property and to establish a system of water supply, and it supplied the City and its inhabitants with water from October 31, 1881, until January 31, 1895, when all of its property was acquired by the City under the circumstances hereinafter stated.

The Company has as yet received no compensation for

this property, which is alleged in the bill to be of the value of at least $750,000, while the City has received the entire revenues since January 31, 1895.

August 17, 1880, a contract was made between the Water Company and the City, in accordance with the provisions of chapter 235 of St. 1880, sec. 8, which contract was to run for twenty years from October 1, 1881, unless the City should purchase the property of the Water Company in accordance with section 11 of said chapter 235, whereby it was agreed that the Company should furnish the City with water and the City should pay the compensation therein provided.

In 1893 the City of Newburyport procured the passage of St. 1893, c. 471, by which it was authorized to establish an independent system of water supply. Section 12 of this act provided that at any time within sixty days after the passage of the act, the Water Company might notify the mayor of Newburyport in writing that it desired to sell its property to the City, and might execute and deliver proper deeds thereof, and that if a majority of the voters of the City should then vote to purchase the property, the same should become the property of the City and the City should be liable to pay the fair value thereof, and in case the parties were unable to agree upon the value, the same should be determined by commissioners. Section 13 provided that after the vote provided for in section 12, or if the Water Company should not notify the mayor within sixty days, the act should be submitted to the voters of the City for their acceptance or rejection, and should take effect after its acceptance by two-thirds vote of the voters of the City present and voting thereon. The Water Company, in pursuance of this act, notified the City of its desire to sell its property to the City, but the citizens, by a majority vote, declined to purchase the same. Subsequently the citizens voted by more than a two-thirds vote to accept the act of 1893. It is claimed by the Water Company that this last

vote was unauthorized by the statute, and that the statute of 1893 was void because of the preceding vote *not* to purchase. The City, however, has claimed and claims that section 12 of the statute of 1893 authorized this vote to be taken, although the City had voted not to buy the property of the Water Company, and that therefore the act of 1893 was and is in force. The City was advised that the statute of 1893 was in force, and, claiming to act under the authority of that statute, employed an engineer to make surveys for the establishment of an independent water supply, and incurred expense therefor. (Stipulation I. (*e*), (*f*), R. 90.)

As it was apparent from these proceedings that the City was intending to destroy the Water Company by competition, or by threats of competition, the latter applied to the legislature of 1894 for the passage of an act requiring the City to buy the property of the Water Company before it should proceed to supply itself with water under the act of 1893. The City opposed the passage of this act, and at legislative hearings upon the subject the mayor of Newburyport stated that when the City went into competition with the Water Company the natural effect of it would be to ruin the latter; that he did not see any other way for it; that he did not think that the Company could compete with the City, and that he wanted the legislature to leave the City as it was under the act of 1893. (Affidavit of Thomas E. Major, and Stipulation I. (*g*), R. 93, 90–91.) The legislature failed to enact the statute as requested by the Water Company, but it passed an act (St. 1894, c. 474) by which it was provided that if within thirty days after the passage of the act the Water Company should notify the City of its desire to sell its property to the City, the City should not proceed to establish a water supply under the provisions of St. 1893, c. 471, unless it should have first bought the property of the Company; but it was provided that in determining the value of the property the same

should be estimated without enhancement on account of its future earning capacity or good-will or its franchise.

As the result of this legislation and these proceedings by the City, the latter held the Water Company by the throat, and could practically compel it to yield up its property on a basis of valuation which must necessarily exclude its most valuable rights. If the Water Company failed to offer its property to the City in accordance with the provisions of the act of 1894, the City would claim that it was relieved from any further restraint as to establishing an independent system, and could proceed to do so; and, although it might be clear that if the statute of 1893 stood alone it did not become effective in view of the peculiar provision of sections 12 and 13, yet that it was by no means certain that it might not be held that the effect of the statute of 1894 was to make the statute of 1893 effective in case the Water Company should fail to notify the City of its desire to sell. Under these circumstances, and having only thirty days within which to determine what to do, the stockholders of the Water Company, believing that the City was liable to compete with the Water Company, and that such competition would ruin the Company, notified the City of its desire to sell its property in accordance with the statute of 1894.

Subsequently the Water Company petitioned for the appointment of commissioners for the valuation of its property under the statute of 1894, and such commissioners were appointed, and heard the parties, and made a report, which was accepted by the Supreme Court; but no judgment has been entered in said court, and no payment on account of the same has been offered or received. In the report of the commissioners it is stated that by the terms of the act of 1894 they considered that they were required to exclude from their consideration the income derived by the Company from its business, and all franchise rights of the Company and its good-will, though they find that these

17416

franchises were valuable. The report then came before a single justice of the Supreme Court, who did not pass upon this construction, but reserved it for the full court, which subsequently approved the construction of the commissioners.

This bill was brought before final judgment on the petition in the state court.

In the opening on behalf of the Water Company before the commissioners, counsel for the Water Company claimed that if the effect of the act of 1894 was to take from the Company, without compensation, any property or rights acquired by it under its charter, to that extent the act of 1894 was unconstitutional. (R. 93.)

It is to be noted that under the law of Massachusetts the Water Company could not, in proceeding under the act, question its constitutionality; but was permitted to proceed under the act and question its constitutionality later by an independent bill in equity.

Such was the bill in the present case; and it was open to bring such bill either in the state court or (as was actually done) in the United States Circuit Court.

Shortly stated, the plaintiff claims that, although the statute of 1894 provided for a sale which was apparently voluntary, such sale was compulsory in fact and in law, and in effect was a taking of plaintiff's property under the authority of the state, which provided compensation for only part of the property so taken, and therefore was in violation of the provision of the Fourteenth Amendment in reference to due process of law.

The bill also claims that the statute of 1894 was in violation of plaintiff's rights under the clause of the federal Constitution relating to the obligation of contracts.

The important points disclosed by the foregoing statement of facts are, —

1. That the City of Newburyport, after full opportunity and consideration of the subject, determined not to invest

its own capital in the establishment of a water plant, and therefore impliedly agreed that it would permit and approve the action of private parties in undertaking such work.

2. That private parties came forward and embarked their capital and skill in the establishment and development of a water system.

3. That the act under which this was done authorized the City, at any time after ten years from the completion of the works, to wit, at any time after October 31, 1891, to buy the property of the Company at a fair value, and that both the parties who were incorporated under this act and the City of Newburyport understood perfectly well that either the Company should be entitled to retain and enjoy its property, or that, if the City bought it, it should buy the Company's whole property at a fair value.

This constituted a contract binding both in law and in honor on the Commonwealth and on the City of Newburyport.

4. That the City, by its express contract with the Company of August 17, 1880, agreed to pay the Company for water for twenty years from October 1, 1881, unless it should purchase the property of the Water Company in accordance with the statute of 1880.

5. That the City permitted the Water Company to incur the large expenses necessarily involved in a work of such magnitude, and to hold its property during the earlier years of its development, when its returns would be naturally small, but in 1893 conceived the plan of ruining the Company, and, as a first step, procured the passage of the act of 1893. This act, however, did not contemplate the payment of anything less than a fair price for the value of the property of the Water Company; but the City's construction of the law was that after it had failed to buy the property of the Company it had still authority to establish an independent water supply, and publicly acted as if it so believed it.

17417

6. That, by the statute of 1894, the City, under the authority of the statute, drove the Company into the alternative above stated, as a result of which it has obtained all the property of the Company; and, unless the latter can be protected from these proceedings in this court, it will receive as compensation a sum which represents only a small part of the valuable properties of the Company which the City has acquired.

As the City has set up in its answer a reference to the use of the Merrimac River water by the Water Company, and as certain facts in relation to the same have been agreed to in the stipulation, it may be proper to call attention to them, although the Water Company claims that they are entirely irrelevant to the present discussion. In 1889 the Water Company laid a pipe from its works to the Merrimac river, and in June, 1892, the Company pumped water from the river into its supply from the City, and continued so to do at intervals until March, 1893, since which time no use has been made of the Merrimac River water. It is conceded that the Company was not authorized to use the Merrimac River water. The state board of health had disapproved the river as a source of domestic water supply unless the water therefrom was filtered; but the cities of Lawrence and Lowell used the water for the purpose of domestic supply without filtration. These cities, as well as the city of Haverhill, were above the city of Newburyport on the river, and all three cities, as well as the town of Amesbury, discharged their sewage into the river. The city of Lawrence, at that time a place of 44,000 inhabitants, drew its water supply from the river without filtration, although the city of Lowell, of 77,000 inhabitants, above it, discharged its sewage into the river as above stated. The Newburyport Water Company laid its pipe to the river as a possible safeguard, in case of extreme drought or interruption of its regular supply. It did not use the water

for more than three years after the pipe was laid. It then used it only at intervals, and in comparatively small quantities, and there is no proof that this water, mixed as it was with the general supply from the Company's works, ever caused epidemic, or even a single case of illness; and there is nothing in the stipulation from which the court can find that such was the fact. It is true, however, that some physicians and the state board of health attributed some illness in the winter of 1892–1893 to the use of the Merrimac River water, and that this fact was presented to the legislative committee in 1893; but it made so little impression upon that committee that the latter reported against the enactment of the statute petitioned for by the City.

Inasmuch as the Water Company was not authorized by law to use the Merrimac River water, it is needless to say that if, after objection was raised to the use of the water, it had continued to do so, it could have been easily restrained by proper legal proceedings; so that the suggestion that the statute of 1893 was passed either to prevent the possibility of further use of the Merrimac River water, or to punish the Company for its past use, is equally irrelevant to this case.

History of the Newburyport Case.

The bill was filed July 21, 1897.

September 9, 1897, the defendant filed a motion to dismiss the bill for want of jurisdiction.

September 13, 1897, that motion was heard and denied.

September 27, 1897, the defendant filed a demurrer to the bill, which was heard October 23, 25, and 30, 1897.

February 24, 1898, the demurrer was overruled.

April 14, 1898, defendant filed a petition for rehearing on the demurrer, and on the same day defendant filed its answer.

Under this petition for rehearing the defendant filed a

brief, and, at the special request of the court, plaintiff presented to the court a brief in reply, to which the defendant replied in another brief.

November 17, 1898, defendant's petition for rehearing was denied, and on the same day defendant offered to file a special demurrer. Plaintiff objected to the filing of the special demurrer, and the court ordered that the special demurrer be "received."

December 31, 1898, the court heard defendant's motion for leave to file special demurrer, and on January 7, 1899, denied that motion.

Plaintiff's replication was filed June 15, 1899.

With the consent of both parties the court thereafter made the following order: —

> "ORDERED: That the constitutional question, — to wit, whether or not the plaintiff has been deprived of its property without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States, — be first heard; and that all questions as to plaintiff's relief, if any (including questions of valuation of the property alleged to have been taken), await the determination of the constitutional question." (R. 92.)

The constitutional question was argued before COLT and BROWN, JJ., June 28, 29, and 30, 1899 (R. 130); and on August 8, 1900, the court rendered its decision and opinion thereon in favor of the defendant. (R. 113.)

As the decision of August 8, 1900, was only upon the question under the Fourteenth Amendment, the plaintiff claimed the right to a further hearing upon the claim under the contract clause of the Constitution. That this right was conceded by the Circuit Court is shown by the further record, showing that January 10, 1901, a special examiner was appointed (R. 130); and March 22, 1901, a

stipulation was filed (R. 94); and that on May 22, 1901, the case was heard before COLT and BROWN, JJ., on questions raised by the stipulation filed March 22, 1901. (R. 130.)

It should be noted that, in the order for the hearing upon the constitutional question (June 20, 1899), it was provided that all questions as to plaintiff's relief, if any (including questions of valuation of the property alleged to have been taken), should await the determination of the constitutional question. In the stipulation (R. 94) which preceded the next hearing it was further agreed that all questions of relief should await the final determination of the question whether plaintiff was entitled to any relief, etc. The hearing thereon was upon May 22, 1901, and the decision following thereafter was rendered January 21, 1902. (R. 130.) The record does not include the *per curiam* opinion *in the form in which it first came down*, but gives only the amended opinion *per curiam* filed March 5, 1902. (R. 128, 131.) The docket entry of January 21, 1902, shows, however, that the court had decided against the plaintiff: "Opinion *per curiam*. 'The motion to reopen the case is denied; and the motion to enter a final decree dismissing the bill is granted.'" (R. 130.)

The case was finally disposed of March 5, 1902, as shown by the following docket entries of that date: —

"Mar. 5. — COLT & BROWN, JJ. Ordered that second docket entry of May 22, 1901, be amended so as to read as follows: 'May 22 Heard before COLT and BROWN, JJ. on questions raised by stipulation filed March 22, 1901; it being orally agreed that said hearing shall be also a final hearing in the case.'

"Mar. 5. — Ordered further that the opinion *per curiam* filed Jan. 21, 1902, be amended and the docket entry of that date vacated.

"Mar. 5. — Amended opinion *per curiam* filed.
"Mar. 5. — Motion for final decree granted.
"Mar. 5. — Final decree, bill dismissed with costs — decree in files." (R. 131.)*

The amended opinion *per curiam* of March 5, 1902, shows that the hearing subsequent to the opinion of August 8, 1900, was in reference to plaintiff's claim that its rights under the clause of the Constitution relating to the "obligation of contracts" had been violated. (R. 128, 129.)

The final decree specifically passed upon plaintiff's alleged rights under the Fourteenth Amendment and under the contract clause of the Constitution of the United States, and dismissed plaintiff's bill, thus denying plaintiff's said claims under the Constitution of the United States. (R. 107.)

The Questions Involved in the Newburyport Case.

An examination of the pleadings and the stipulations filed in lieu of taking testimony, and of the opinions of court, and of the final decree filed in this case, all as they appear in the transcript of record, will show that the following questions are involved in this case, and that they arise upon the appeal from the final decree of the Circuit Court: —

First. Was the plaintiff deprived of its property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States?

Second. Did the plaintiff fail to establish a taking of its property without just compensation under the authority of the State of Massachusetts?

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*As to facts relating to the appeal, see *ante*, p. 2.

Third. Was the sale of the plaintiff's property compulsory in law as well as in fact?

Fourth. Did the Circuit Court err in that it did not hold that the act of 1894 (including the act of 1893, as re-enacted by the act of 1894) was compulsory in law as well as in fact, and constituted duress?

[The said act of 1894 is chapter 474 of the Massachusetts acts of 1894; and the said act of 1893 is chapter 471 of the Massachusetts acts of 1893.]

Fifth. Did the Circuit Court err in holding "that the threatened grant of such a franchise under the act of 1894 (admitting this to be the effect of the act), was a lawful exercise of legislative power"?

Sixth. Did the said act of 1894 (including the act of 1893 as re-enacted by said act of 1894), as construed by the highest court of Massachusetts, authorize a taking of plaintiff's property without just compensation; and did it thereby deprive plaintiff of its property without just compensation, in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States?

Seventh. Did the Circuit Court err in that it decreed that the obligation of no contract of the plaintiff has been impaired in violation of the contract clause of the Constitution of the United States, to wit, section 10 of article 1 of the Constitution of the United States?

Eighth. Did the Circuit Court err in excluding the testimony offered by plaintiff, to the effect that the commissioners appointed by the state court to value complainant's property, under the act of 1894, did not in fact value the water contract entered into between the complainant and defendant?

See Eighth Assignment of Error; *post*, p. 18; also R. 133.

The remaining questions are perhaps, in effect, repetitions of some of the former questions, but are inserted in a different form, out of abundant caution.

Ninth. Did the Circuit Court err in that it did not hold, adjudge, and decree that the said act of 1894 (including said act of 1893 as re-enacted by said act of 1894), as construed and applied by the highest court of the state of Massachusetts, impaired and impairs the obligation of contracts belonging to plaintiff, in violation of section 10 of article I. of the Constitution of the United States, and of the plaintiff's rights thereunder? (R. 133.)

Tenth. Did the Circuit Court err in that it ordered, adjudged, and decreed that plaintiff's bill be dismissed with costs to the defendant? (R. 133.)

Eleventh. Did the Circuit Court err in that it did not adjudge and decree that plaintiff is entitled to relief? (R. 133.)

It would seem that the above questions may be condensed into the following: —

FIRST.

Was the plaintiff deprived of its property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States?

It will appear that the principal question involved in the above is —

(A) *Was the property of the plaintiff, or any part of it, (1) taken under the authority of the state of Massachusetts (2) without just compensation?*

And it will appear that the crucial question involved in A is —

(a) *Was the sale of the plaintiff's property compulsory in law as well as in fact?*

SECOND.

Did the Circuit Court err in that it decreed that the obligation of no contract of the plaintiff has been impaired in violation of the contract clause of the Constitution of the United States, to wit, section 10 of Article I. of the Constitution of the United States?

THIRD.

Did the Circuit Court err in excluding the testimony offered by plaintiff to the effect that the commissioners appointed by the state court to value complainant's property under the act of 1894 did not in fact value the water contract entered into between the complainant and defendant?

FOURTH.

Did the Circuit Court err in that it ordered, adjudged, and decreed that plaintiff's bill be dismissed with costs to the defendant?

Specification of Errors.

(*Newburyport Case.*)

We rely upon all the errors asserted in our *Assignment of Errors* (R. 131), as follows: —

"I.

The court erred in this:

That it held, adjudged and decreed that the plaintiff has not been deprived of its property without due process of law in violation of the fourteenth amendment to the Constitution of the United States.

II.

The court erred in this:

That it held that the plaintiff failed to establish a taking of its property without just compensation under the authority of the State.

III.

The court erred in this:

That, although it held that the sale of the company's property was compulsory in fact, it held that such sale was not compulsory in law.

IV.

The court erred in this:

That it did not hold that the act of 1894 (including the act of 1893 as re-enacted by the act of 1894,) was compulsory in law as well as in fact, and constituted duress.

The said act of 1894 is chapter 474 of the Massachusetts Acts of 1894; and the said act of 1893 is chapter 471 of the Massachusetts Acts of 1893.

V.

The court erred in this:

That it held 'that the threatened grant of such a franchise under the act of 1894 (admitting this to be the effect of the act) was a lawful exercise of legislative power.'

VI.

The court erred in this:

That it did not find and hold that the act of 1894, (including the act of 1893 as re-enacted by said act of 1894) as construed by the highest court of Massachusetts in effect authorized a taking of plaintiff's property without just compensation; and that thereby and thereunder the State of Massachusetts deprived plaintiff of its property without just compensation in violation of the provision of the fourteenth amendment to the Constitution of the United States.

The said act of 1894 is chapter 474 of the Massachusetts Acts of 1894; and the said act of 1893 is chapter 471 of the Massachusetts Acts of 1893.

VII.

The court erred in this:

That it adjudged and decreed that the obligation of no contract of the plaintiff has been impaired in violation of the contract clause of the Constitution of the United States, to wit, section 10 of article I of the Constitution of the United States.

VIII.

The court erred in this:

That it excluded the testimony offered by plaintiff to the effect that the commissioners appointed by the State court to value complainant's property under the act of 1894 did not in fact value the water contract entered into between the complainant and defendant. The testimony so offered and rejected was offered under a stipulation between the plaintiff and defendant, which is set forth in the record in the circuit court at page 125 *et seq.*, and the testimony so offered and excluded is stated therein as follows:

'It is hereby agreed, if in the opinion of the court the testimony of the commissioners below referred to is competent evidence, is admissible at this stage of the case, and is material, that the commissioners appointed under Mass. St. of 1893, chap. 471, sect. 12, to value the property of the plaintiff company, if called as witnesses in this cause, would testify, without contradiction, that they did not in fact value as part of said property the contract between the company and the city, of which a copy marked 'Exhibit D' is an- * to the plaintiff's bill, it being their opinion that the same in law could not be valued; and it is also agreed that the same shall be dealt with in like manner as if said commissioners had so testified before the

* Should be "annexed."

17422

commissioner appointed by the court in this case, and as if said objections as to competency, materiality, and admissibility at this stage of the case had been duly taken before such commissioner and reserved for the consideration of the court; and it is also agreed that the petitioner at the hearing put the contract in evidence under objection.'

IX.

The court erred in this:

That it did not hold, adjudge and decree that the said act of 1894 (including said act of 1893 as reenacted by said act of 1894), as construed and applied by the highest court of the State of Massachusetts, impaired and impairs the obligation of contracts belonging to plaintiff in violation of section 10 of article I of the Constitution of the United States under* the plaintiff's rights thereunder.

X.

The court erred in this:

That it ordered, adjudged and decreed that plaintiff's bill be dismissed with costs to the defendant.

XI.

The court erred in this:

That it did not adjudge and decree that plaintiff is entitled to relief." (R. 131–133.)

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* Should be "and of."

The Gloucester Case. (No. 183.)

Statement.

Jurisdictional Facts.

The plaintiff (appellant) is a Massachusetts corporation established to supply water to the defendant, the City of Gloucester, a Massachusetts municipal corporation, and its inhabitants.

The suit is of a civil nature, in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of $2000, to wit, that the same exceeds, exclusive of interest and costs, the sum or value of $900,000. (Gl. R. 18.)

The suit is also one arising under the Constitution of the United States.

That it involved constitutional questions *ab initio* appears in the bill (Gl. R. 17, 18), where plaintiff claims violations of its rights under the Constitution of the United States, and particularly alleges the violation of section 10 of article I. of the Constitution of the United States and of plaintiff's rights thereunder, and the violation of article XIV. of the amendments to the Constitution of the United States and of plaintiff's rights thereunder. (Gl. R. 17, 18.)

Facts relating to Time of taking and entering Appeal.

The final decree, dismissing plaintiff's bill, was made and entered October 1, 1902. (Gl. R. 92, 114.)

The appeal to the present court was allowed and the bond approved and filed December 8, 1902. (Gl. R. 114.)

The assignment of errors was filed December 8, 1902. (Gl. R. 114.)

The appeal was entered and docketed in the Supreme Court of the United States January 2, 1903.

17423

General Statement of Plaintiff's Grievance under the Provision of the Fourteenth Amendment Relating to "Due Process of Law."

Mutatis mutandis, our general statement here is the same as the general statement in the Newburyport case (*ante*, p. 2).

Plaintiff's grievance as to "due process of law" is, shortly stated, that, although the sale under chapter 451 of the Massachusetts acts of 1895* was *voluntary in form*, it was *compulsory in fact and in law;* that such compulsory sale constituted *in effect* a *taking* of plaintiff's property; that that statute, as construed by the Supreme Court of Massachusetts, provided for compensation for only *part* of the property taken; that the part for which no compensation whatever was provided consisted of certain franchise rights which were of the value of more than $900,000; that the taking of such part of our property without compensation was in violation of plaintiff's rights under the Fourteenth Amendment to the Constitution of the United States, as hereinafter shown.

It is to be noted that the Circuit Court disposed of this case on demurrer in the following—

"*Rescript.*

June 23, 1902.

COLT, J.:

> This case, in our opinion, is governed by the case of *The Newburyport Water Company* v. *City of Newburyport* and the demurrer to the bill is therefore sustained." (Gl. R. 89.)

The Gloucester legislation followed upon the heels of the Newburyport invention of what we claim to be a *taking* of

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* This is erroneously indexed in the record as page 40. It appears at page 48.

private property without just compensation under the form of a statutory sale which is voluntary in appearance, but compulsory in fact and in law.

The resemblance between the Newburyport and Gloucester statutes is very marked; but there are differences which we shall point out; and there were also differences in the steps leading to the final enactment in each case. We shall show that these differences greatly strengthen our argument in the Newburyport case, and are also sufficient to entitle us to a reversal of the decree in the Gloucester case, even if the present court should affirm the decree in the Newburyport case.

History of the Legislation involved, as shown in Plaintiff's Bill.

In 1880 the legislature of Massachusetts passed an act (c. 203, see Gl. R. 22) authorizing the City of Gloucester to construct a water-supply system; which act, however, was rejected by the City (Gl. R. 2), and in the following year an act was passed (1881, c. 167, see Gl. R. 19) incorporating the Gloucester Water Supply Company, and authorizing this Company to construct and operate a water-supply system and to make contracts with the City and others for supplying water, but with the provision (sec. 7) that the City might at any time during the continuance of the charter, purchase from the Company all its property, rights, etc.

Under the provisions of this act the Water Company made contracts in 1886 and 1887 with the City for supplying water, chiefly for fire purposes, for a period of ten years, unless the contract should be sooner terminated by the purchase of the Company's property and franchises by the City, in accordance with the provisions of the act. (Sec. 7, Exhibits C and E, Gl. R. 24–26, 27–31.)

In 1893 the City, instead of purchasing the property of

17424

the company in accordance with the provisions of the act of 1881 and of the contracts made thereunder, attempted to secure the passage of an act authorizing it to construct and operate competing water works, and with no obligation on its part to buy out the Water Company. (Gl. R. 5, 6, 31, 32.)

In its petition to the legislature the City asked for authority to take, by purchase or otherwise, the waters of any pond, stream, or well, within the limits of the city; thus requesting, not only the means of competing with the Water Company, but of taking any or all of the Water Company's supply.

This proposed legislation was opposed by the Company and was ultimately rejected by the legislature. (Gl. R. 6, 7.) In the following year, however, renewed attempts were made by the City to secure the desired legislation, and although the City was unable to get its proposed bill "reported" by the legislative committee (Gl. R. 7, 8), it succeeded in introducing in the house of representatives, — still against the opposition of the Company, — a substitute bill authorizing municipal competition unless the Company would sell its property to the City upon a valuation which expressly and unmistakably excluded the values of all franchise rights. (Gl. R. 8, 47, 48.)

This substitute bill did not pass in the form presented; nevertheless the City was able, against the never-ceasing opposition of the Company, to obtain the passage of the act of 1895, c. 451, *which authorized municipal competition unless the Company would first sell to the City "all the corporate property and all the rights, privileges,"* etc., . . . "used in supplying said City and its inhabitants with water;" and all at a value which should be "*estimated without enhancement on account of future earning capacity, or future good will, or on account of the franchise of the Company.*" (Act of 1895, c. 451, sec. 16, Gl. R. 53.)

The City of Gloucester accepted the act; the Water Company voted to sell thereunder, giving notice, however, of its claim to constitutional protection; the sale was carried out as provided by the act; and the City took and has retained possession of the property.

The act was accepted, as provided therein, by the City, July 23, 1895 (Gl. R. 9), and on August 15, 1895, the Company gave to the City the required notification under the provisions of the act (Gl. R. 10, 11), and delivered therewith a copy of the vote to sell as passed by the Company; which vote contained the Company's claim for just compensation for the property and rights to be sold and its claim that "if said chapter 451 of the Statutes of 1895 undertakes to authorize said city to acquire said franchise and property for less than the just, reasonable and full compensation therefor, such provision is unconstitutional and void." (Gl. R. 9, 10; Exhibit L, R. 54.)

[These claims, thus officially brought to the attention of the City, were in the nature of a protest and notification of the reservation of the Company's right under Massachusetts laws to contest the constitutionality of the procedure even after proceeding under the statute, to determine the compensation.]

On the same day — August 15, 1895 — the Company filed the "specification and description" required by the act (Gl. R. 10, 11), which instrument contained the following: —

> "*Item 40. The rights, privileges and easements acquired by said company under said chapter 167* of the Acts of the Legislature of Massachusetts for the Year 1881, and now in use by it, of laying and maintaining water pipes and mains in said streets, and of making connections therewith, for the purpose of supplying said city and the inhabitants thereof with water, and all property, property rights, privileges, easements, waters, and water-rights of said company, *and all the*

rights and franchises of said company whether *for supplying water* to the city of Gloucester and the inhabitants thereof *and of collecting water rates* therefor or otherwise.

"Hereby intending to specify and describe all the corporate property, and all the rights, privileges, easements, lands, waters, water-rights, dams, reservoirs, pipes, engines, boilers, machinery, fixtures, hydrants, tools, and all appliances owned by said company and used in supplying said city and the inhabitants thereof with water." (Gl. R. 76.)

The City subsequently, September 5, 1895, refused to admit the correctness of the description of the property filed by the City (which thus expressly included the above franchise rights and privileges), and so notified the Company of its refusal (Gl. R. 89); and on September 24 voted to purchase the property of the Water Company under and in accordance with the provisions of section 16, chapter 451, of the acts of 1895 (Gl. R. 11, 90); and on October 1, 1895, took possession of and has since continued to possess and use the same for the benefit of the City. (Gl. R. 11.)

Proceedings before Commissioners and in the State Court.

After the parties had tried and failed to agree upon the value of the property, plaintiff petitioned the Supreme Judicial Court to appoint three commissioners to determine the fair value of said property. The court appointed these September 24, 1897. (Gl. R. 11.)

The commissioners heard the parties; and on or about June 29, 1900, reported to the court, *inter alia*, that property consisting of three rights belonging to said Company was not valued; viz., —

"1. The franchise right to take additional sources of supply in ward 8 in said city;

"2. The franchise right to lay and maintain pipes in the streets of said city;

"3. The franchise right to charge water rates for water supplied to said city and its inhabitants.

"That the value of said three rights is, in fact, covered by and included in the value and amount of the earnings and income of the plaintiff company."

Gl. R. 11, 12.

The commissioners also reported: —

"In valuing the property, we have followed the rule adopted by the Court in the Newburyport case, 168 Mass., 341." (Gl. R. 12.)

The report also included the following: —

"In approaching a valuation by this method, *we have not considered the past, present or prospective income, good will, or the franchise rights.* We have arrived at this conclusion on account of the phrase in section 16, chapter 451, Acts of 1895, that such value shall be estimated without enhancement on account of future earning capacity or future good will, or on account of the franchise of said company, and do not think that in the construction thereof the word 'future' qualifies this conclusion. *We have treated it as property which the company can no longer use*, but the city can, and is to pay a fair value for upon these conditions.

"*If*, however, the fact of the income which the company was receiving at the transfer is an element that can, under this statute, be considered as bearing upon the question of a fair valuation, this award, as we respectfully submit, *ought to be reformed, and*

the question of valuation be reconsidered." (Gl. R. 13, 14.)

The report also contained the following: —

"2. The city of Gloucester having purchased the property as and for a water plant in its entirety, and as that is the use to which it is best adapted, we have valued the same as such, and in doing so *have not involved the exercise of any public franchise or franchise right*, nor what it was worth to the city or to the petitioner, but what it was fairly worth, having regard to all the facts." (Gl. R. 16.)

The Company's Contract to furnish the City Water for Fire Purposes was valued under Peculiar Circumstances.

The City claimed before the commissioners that the contract subsisting October 1, 1895, between the City and the Company, — being said contract No. 2, — was not, under the act of 1895, to be included in the valuation and award under the act; *nevertheless the City, by its counsel, suggested to the commissioners that that contract be valued by the commissioners, and accordingly it was so valued.* The valuation did not, however, appear separately, but was included in the commissioners' final award. (Gl. R. 16.)

Both parties objected to the commissioners' report; the report and award were not passed upon by the single justice, but were reserved by him for consideration of the full court. (Gl. R. 16.)

The report and award and the motions and questions thereon were later argued before and considered by the full court, which, June 19, 1901, by LORING, J., rendered a decision and opinion confirming the commissioners' report in the exclusion from valuation of the rights and earn-

ings and income of plaintiff Company. (Gl. R.16, 17.) A copy of the opinion appears in Gl. R. 79.

After the decision of the full bench of the state court, and before decree, the plaintiff Company brought the present bill in the Circuit Court, alleging, *inter alia*, that the act of 1895 threatened the Company with municipal competition and consequent ruin unless it would sell its property, apparently voluntarily, to the City upon the terms of said act as construed and applied by the commissioners (Bill, par. 17, Gl. R. 11–16), and by said full court (Bill, par. 18, Gl. R. 16, 17), and that such *sale was influenced and compelled by said threat and was compulsory in fact and in law*. (Bill, par. 19, Gl. R. 17.)

Questions presented by Plaintiff's Bill and the Demurrer thereto.

The questions raised in the Circuit Court in the Gloucester case are clearly shown from the allegations and prayers in the bill, wherein plaintiff avers and claims, —

(*a*) That the act of 1895 (c. 451) is in violation of the obligation of the contract clause of section 10 of article I. of the Constitution of the United States.

(*b*) That by said act, as construed by the state court, the state of Massachusetts deprives plaintiff of its property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States.

(*c*) That, similarly, the state of Massachusetts denies to plaintiff the equal protection of the laws in violation of said Fourteenth Amendment. (Gl. R. 17.)

And plaintiff further avers, —

(*a*) That said act was novel; that the only act at all resembling it in the terms of the so-called "sale" was the Massachusetts act of 1894 (c. 474), the effect and constitutionality of which are still in litigation.

(*b*) That it is the policy and practice of the federal courts not to pass upon the constitutionality of statutes while there remains an opportunity for the adoption of such construction of the statute involved as would avoid the point or points upon which such constitutionality is questioned.

(*c*) That it was open to the full court of Massachusetts to hold, as claimed before it by the Company, that the Company was entitled, under the act, to compensation from the City for all its property, except its franchise to be a corporation, and thereby to obviate all questions of constitutionality raised by this bill.

(*d*) That it was not open to the plaintiff Company to contend before the commissioners nor before the state court that the act was unconstitutional.

(*e*) That by proceeding before said commissioners and the state court, plaintiff did not waive its right to contend, in the proper court or courts, that the act violated plaintiff's constitutional rights; but, on the contrary, plaintiff has always claimed that if the act should be construed and applied as it has been by said commissioners and by said state court, the act is unconstitutional and void.

(*f*) That no decree or judgment has yet been entered upon the award by the commissioners; and no payment thereunder has been made or tendered to plaintiff. (Gl. R. 17, 18.)

In consequence of which plaintiff prays, —

1st. That chapter 451 of the acts of 1895, as construed by said full court, be adjudged unconstitutional, and in violation of plaintiff's rights under the Constitution of the United States.

2d. That it be decreed that the defendant has taken and held the property described in Exhibit M (Gl. R. 54) in violation of rights secured to plaintiff by the Constitution of the United States.

3d. For general relief. (Gl. R. 18.)

To this bill the defendant demurred. (Gl. R. 87.)

The Circuit Court sustained the demurrer in a "Rescript" by COLT, J., saying, —

> "This case, in our opinion, is governed by the case of the *Newburyport Water Company* v. *City of Newburyport*, and the demurrer to the bill is therefore sustained." (Gl. R. 89.)

Thereupon a final decree was entered, dismissing plaintiff's bill (Gl. R. 92, 114), and plaintiff appealed directly to the present court. (Gl. R. 114.)

As the Circuit Court held that the Gloucester case was governed by the Newburyport case (Gl. R. 89), and thereupon dismissed plaintiff's bill, it follows that the later case also was determined upon the one crucial point upon which our constitutional claims in the earlier case were decided against us.

And as the present case was held governed by the Newburyport case, the opinions of the Circuit Court in the Newburyport case are placed in the record of the Gloucester case.

For opinion on demurrer, see Gl. R. 93 (85 Fed. Rep. 723); on claim under Fourteenth Amendment, Gl. R. 98 (103 Fed. Rep. 584); and on claim as to violation of the obligation of contracts, Gl. R. 113 (113 Fed. Rep. 677).

The Questions herein Presented.

Examination of the pleadings, and of the said opinions and rescript of the Circuit Court, and of the decree thereon, all as they appear in the transcript of record, will show that the following questions are involved in this case, and that they arise upon the appeal from the final decree of the Circuit Court: —

First. Was the plaintiff deprived of its property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States?

Second. Did the plaintiff fail to establish a taking of its property without just compensation, under the authority of the state?

Third. Was the sale of the plaintiff's property compulsory in law as well as in fact?

Fourth. Did the Circuit Court err in that it did not hold that the act of 1895, being chapter 451 of the Massachusetts acts of 1895, was compulsory in law as well as in fact, and constituted duress?

Fifth. Did the Circuit Court err in holding in effect that the threatened grant to the defendant, the City of Gloucester, of a competing franchise under said act of 1895 (c. 451), was a lawful exercise of legislative power?

Sixth. Did the said act of 1895 (c. 451), as construed by the highest court of Massachusetts, authorize a taking of plaintiff's property without just compensation; and did the state or commonwealth of Massachusetts thereby deprive plaintiff of its property without just compensation in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States?

Seventh. Did the Circuit Court err in that it held in effect that the obligation of no contract of the plaintiff has been impaired in violation of the contract clause of the Constitution of the United States, to wit, section 10 of article I. of the Constitution of the United States?

Eighth. Did the Circuit Court err in that it did not hold that said act of 1895 impaired and impairs the obligation of plaintiff's contracts with the defendant, and thereby violates section 10 of article I. of the Constitution of the United States, and plaintiff's rights thereunder?

Ninth. Did the Circuit Court err in that it held in effect that by said act of 1895, as construed and applied by the

highest court in Massachusetts, the state or commonwealth of Massachusetts did not deny to plaintiff the equal protection of the laws, in violation of the Fourteenth Amendment to the Constitution of the United States, and of plaintiff's rights thereunder?

Tenth. Did the Circuit Court err in holding that this case is governed by the case of the *Newburyport Water Company* v. *The City of Newburyport?*

Eleventh. Did the Circuit Court err in sustaining defendant's demurrer, and decreeing thereupon that plaintiff's bill be dismissed?

It would seem that the above questions may be condensed into the following: —

FIRST.

Was the plaintiff deprived of its property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States?

It will appear that the principal question involved in the above is —

A. *Was the property of the plaintiff, or any part of it, (1) taken under the authority of the state of Massachusetts (2) without just compensation?*

and it will appear that the crucial question involved in A *is —*

(a) *Was the sale of the plaintiff's property compulsory in law as well as in fact?*

SECOND.

Did the Circuit Court err in that it held in effect that the obligation of no contract of the plaintiff has been impaired in violation of the contract clause of the Constitution of the United States, to wit, section 10 of article I. of the Constitution of the United States?

THIRD.

Did the Circuit Court err in that it ordered, adjudged, and decreed that plaintiff's bill be dismissed with costs to the defendant?

Specification of Errors.

(*Gloucester Case.*)

The errors assigned are as follows: —

"*Assignment of Errors.* (Gl. R. 115, 116.)

I. The court erred in this: That it held that the plaintiff has not been deprived of its property without due process of law in violation of the fourteenth amendment to the Constitution of the United States.

II. The court erred in this: That it held that the plaintiff failed to establish a taking of its property without just compensation under the authority of the State.

III. The court erred in this: That, although it held that the sale of the company's property was compulsory in fact, it held that such sale was not compulsory in law.

IV. The court erred in this: That it did not hold that the act of 1895, being chapter 451 of the Massachusetts Acts of 1895, was compulsory in law as well as in fact, and constituted duress.

V. The court erred in this: That it held, in effect, that the threatened grant to the defendant, The City of Gloucester, of a competing franchise under said act of 1895 (being chapter 451 of Massachusetts Acts of 1895) was a lawful exercise of legislative power.

VI. The court erred in this: That it did not hold that by said act of 1895, (chapter 451 of Massachusetts Acts of 1895), as construed and applied as alleged in plaintiff's bill in this suit, the State or

Commonwealth of Massachusetts deprived and deprives plaintiff of its property without due process of law, in violation of the fourteenth amendment to the Constitution of the United States and of plaintiff's rights thereunder.

VII. The court erred in this: That it held, in effect, that the obligation of no contract of the plaintiff has been impaired in violation of the contract clause of the Constitution of the United States, to wit, section 10 of article I of the Constitution of the United States.

VIII. The court erred in this: That it did not hold that said act of 1895 (being chapter 451 of Massachusetts Acts of 1895), impaired and impairs the obligation of plaintiff's contracts with defendant, The City of Gloucester, alleged in plaintiff's bill in this suit, (including plaintiff's franchises), and thereby violates section 10 of article I of the Constitution of the United States and plaintiff's rights thereunder.

IX. The court erred in this: That it held in effect that, by said act of 1895, (being chapter 451 of Massachusetts Acts of 1895), as construed and applied as alleged in plaintiff's bill in this suit, the State or Commonwealth of Massachusetts did not and does not deny to plaintiff the equal protection of the laws in violation of the fourteenth amendment to the Constitution of the United States and of plaintiff's rights thereunder.

X. The court erred in this: That it did not hold that, by said act of 1895 (being chapter 451 of Massachusetts Acts of 1895), as construed and applied as alleged in plaintiff's bill in this suit, the State or Commonwealth of Massachusetts denied and denies to plaintiff the equal protection of the laws, in violation of the fourteenth amendment to the Constitution of the United States and of plaintiff's rights thereunder.

XI. The court erred in this: That it held as follows: 'This case, in our opinion, is governed by the case of The Newburyport Water Company *vs.* City of Newburyport.'

XII. The court erred in this: That it sustained the defendant's demurrer to plaintiff's bill.

XIII. The court erred in this: That it ordered, adjudged and decreed that the plaintiff's bill be dismissed, with costs to the defendant to be taxed by the clerk.

XIV. The court erred in this: That it did not overrule the defendant's demurrer."

The Newburyport Case.

Argument.

Jurisdiction.

The defendant's first pleading in the case was a motion to dismiss plaintiff's bill for *want of jurisdiction*. (R. 95, 96.)

The defendant next demurred; and its first alleged ground of demurrer was that the bill did not show that the Circuit Court had jurisdiction to entertain the same, etc. (R. 57, 58.)

The demurrer was overruled, and the Circuit Court continued its jurisdiction.

Possibly the defendant will again claim and argue here that the Circuit Court had no jurisdiction. Moreover, it is within the province and practice of the court to raise the question of jurisdiction *sua sponte*.

The Circuit Court had Jurisdiction.

The jurisdiction of the Circuit Court is to be determined wholly upon plaintiff's own allegations, and is not limited by defendant's denials, nor does it depend upon the result of the trial of any issues presented by the pleadings of both parties.

> "It is, however, sufficient if a Federal question forms an ingredient of the original cause, although other questions of law or fact may be involved. *Railroad Co.* v. *Miss.*, 102 U.S. 141. The question whether a party claims a right under such Constitution and laws *is to be ascertained from the legal construction of his own allegations*, and not by the effect attributed to those allegations by the adverse party. *N.J. R. Co.* v. *Mills*, 113 U.S. 257. The *jurisdic-*

tion of the circuit court under St. 1875, § 1, *cannot be ousted by the character of the defence, and is not limited by the denials in the defendant's answer.* Even if such answer puts in issue only non-Federal questions, the jurisdiction of the Federal court is not ousted if a Federal question formed an ingredient of the original cause. *Sawyer* v. *Concordia*, 12 F.R. 754, relying on *Mayor* v. *Cooper*, 6 Wall. 253; *Gold Washing Co.* v. *Keyes*, 96 U.S. 203."

1 Notes on Revised Statutes of the United States, Gould & Tucker, p. 101.
See also *Walla Walla* v. *Walla Walla Water Co.*, 172 U.S. 1, at page 11.

We further submit that the jurisdiction of the Circuit Court is fully established under the following cases: —

City Railway Co. v. *Citizens Railway Co.*, 166 U.S. 557, at 562, 563.
Vicksburg Water Works Co. v. *Vicksburg*, 185 U.S. 65, 83.

We show, however, in detail below, the essentials of the Circuit Court's jurisdiction of the present suit, as these are required by law and fulfilled in fact.

Essentials of the Circuit Court's Jurisdiction of the Present Suit.

The essentials of jurisdiction in the present suit are laid down by Congress, under the Constitution, as follows: —

"That the Circuit Courts of the United States shall have original cognizance . . . of all suits of a civil nature, . . . in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or

> value of $2,000, and arising under the Constitution . . . of the United States."
>
> Act of Congress of August 13, 1888, c. 866, Supplement to U.S. Rev. Sts. p. 611.

These are all the affirmative requirements to confer jurisdiction.

The essentials, therefore, are as follows: —

1. A suit of a civil nature in equity.

2. Where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of $2000.

3. And where the suit arises under the Constitution of the United States.

Paragraph 16 of the bill is as follows: —

> "16. Your orator further shows that this is a suit of a civil nature in equity; that the matter in dispute exceeds, exclusive of interest and costs, the sum or value of $2,000, and arises under the Constitution of the United States." (R. 16.)

The jurisdictional facts here broadly alleged are shown specifically in the bill in detail.

1. *That the suit is a civil suit in equity is shown as follows:* —

(*a*) That it is commenced by "Bill of Complaint . . . in equity." See caption of bill.

(*b*) That this caption is justified by the contents of the bill.

The bill alleges that though the City holds the property described in the bill by what appears to be a voluntary sale, yet that the sale was not voluntary, but compulsory; that the defendant holds the property not by the voluntary sale, but by a *taking* under unconstitutional legislation,

and seeks, *inter alia*, to have the deed cancelled and the property restored, and also an injunction to prevent the defendant from alienating or encumbering the property, etc.

In —

Moore v. *Sanford*, 151 Mass. 285, —

the court took jurisdiction of a bill in equity to set aside the taking of land by commissioners under the authority of a Massachusetts statute, upon the ground that such statute was unconstitutional.

See also *Chicago &c.* v. *Minnesota*, 134 U.S. 418, 459, 460.

In so far as compulsion or duress entitles plaintiff to avoid the deed, our suit is also properly a suit in equity.

In —

Brown v. *Pierce*, 7 Wall. 205; and —
Baker v. *Morton*, 12 Wall. 150, —

bills in equity were filed and sustained to set aside deeds obtained by compulsion or duress.

For general principles sustaining the claim that the present suit is properly an equity case, see also —

Story's Equity Jurisprudence (13th ed.) vol. 1, sec. 239.
Ibid, sec. 700.

2. *The matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars.*

This is alleged in the bill and sworn to. It is further shown in the bill that the property in dispute is of the value of "more than $475,000." (Bill, end of paragraph 14. R. 16.)

We further show (*ante*, p. 36) that the jurisdiction of the Circuit Court is to be determined wholly upon plaintiff's own allegations, and is not limited by defendant's

denials, nor does it depend upon the result of the trial of any issues presented by the pleadings of both parties.

While it is sufficient that the jurisdictional amount appear from the plaintiff's bill, yet if it were omitted there it might be shown *aliunde*. It might even "appear by affidavit after the appeal is taken" to the Supreme Court, or otherwise to the satisfaction of the court.

United States v. *Freight Association*, 166 U.S. 290, at page 310.

Whiteside v. *Haselton*, 110 U.S. 296, paragraph 1 of headnote.

3. *The suit arises under the Constitution of the United States.*

The bill, both originally and as amended, alleged that plaintiff's rights under the federal Constitution were violated.

See plaintiff's bill, (par. 14, R. 14–16); also prayer of bill (R. 16, 17), and amendment to bill. (R. 56, 57.)

Further, the decree shows that the Circuit Court specifically passed upon the constitutional claims involved, the decree being as follows: —

"*Final Decree.*

March 5, 1902.

COLT and BROWN, JJ.:

This cause came on to be further heard at this term, and was argued by counsel; and thereupon, upon consideration thereof, it is adjudged and decreed that the plaintiff has not been deprived of its property without due process of law in violation of the fourteenth amendment, and that the obligation of no contract of the plaintiff has been impaired in violation of

17433

the contract clause, of the Constitution of the United States; and it is thereupon further ordered, adjudged and decreed that the plaintiff's bill be dismissed, with costs to the defendant to be taxed by the clerk." (R. 107.)

Wherefore we submit we have shown that the case presents all the essentials required to give the Circuit Court jurisdiction thereof.

As the suit is one arising under the Constitution of the United States, the fact that both complainant and defendant are Massachusetts corporations is immaterial to the jurisdiction of the court.

The essentials remain as above stated; and jurisdiction depends upon the allegations of the bill, and not upon defendant's answer, nor upon the facts as they subsequently turn out.

In —

City Railway Co. v. *Citizens Ry. Co.*, 166 U.S. 557, the court held as follows: —

At pages 562, 563: "1. There can be no doubt that the Circuit Court had jurisdiction of the case, notwithstanding the fact that both parties are corporations and citizens of the State of Indiana. It should be borne in mind in this connection that jurisdiction depended upon the allegations of the bill, and not upon the facts as they subsequently turned out to be. The gravamen of the bill is that, under the act of the General Assembly of 1861, and the ordinances of January 18, 1864, and April 7, 1880, the Citizens' Railroad Company had become vested with certain exclusive rights to operate a street railway in the city of Indianapolis, either in perpetuity or for the term of

thirty years or thirty-seven years, which the city had attempted to impair by entering into a contract with the City Railway Company to lay and operate a railway upon the same streets.

"All that is necessary to establish the jurisdiction of the court is to show that the complainant *had*, or *claimed in good faith to have, a contract* with the city, which *the latter had attempted to impair*."

This was brought on appeal from the Circuit Court of the United States for the District of Indiana. (Ibid. p. 557.)

The following principles were involved in the above: —

(*a*) Although both plaintiff and defendant were corporations and citizens of the same state (Indiana) the United States Circuit Court had jurisdiction of the parties on the ground that the bill alleged that the complainant had a contract or right which the city of Indianapolis had attempted to impair *under a legislative grant* that the city was one of the "agencies" of the state; that any such attempt by the city under a legislative grant was an act of the state against which the prohibition of the federal constitution is directed; that jurisdiction depended on the allegation of the violation of the constitutional right, "and not upon the facts as they subsequently turned out to be."

It was only necessary to show that the complainant had, or claimed in good faith to have, a contract, and alleged that there was an attempt to impair it, which was unconstitutional.

The suit was a "Bill in Equity" (Ibid. p. 558) to enjoin the defendant from performing alleged unconstitutional acts, "and for the establishment of complainant's rights and the quieting of its title in that connection." (Ibid. p. 558.)

We also quote as follows from the same case: —

"Whether the State had or had not impaired the obligation of this contract was not a question which could be properly passed upon, on a motion to dis-

miss, so long as the complainant claimed in *its bill that it had that effect*, and such claim was apparently made in good faith, and was not a frivolous one." (*New Orleans* v. *New Orleans Water Co.*, 142 U.S. 79, 88.)

Ibid. p. 564.

That the plaintiff's constitutional claims are not frivolous is obvious, we submit, upon an inspection of the record; and is also further established by the following facts: —

After a three days' hearing of counsel in argument upon the demurrer, a Circuit Court judge overruled the demurrer.

Afterwards he decided, in his discretion as to the order of procedure, to limit the next step to the determination of the question whether the Fourteenth Amendment had been violated in the present case. This question was heard not by one judge, but by *two* — thus indicating clearly the doubt, difficulty, and importance which the single judge who had heard the demurrer felt to be involved in the case.

We think that all other questions relating to jurisdiction which were raised in the earlier stages by the defendant are arguments not against the jurisdiction, but upon the questions involved after the court properly obtains jurisdiction.

That the Circuit Court had jurisdiction of the bill upon the constitutional question arising under the allegation of the impairment of the obligation of plaintiff's contract (R. 15, 56) is established by the decision and opinion in —

Vicksburg Water Works Co. v. *Vicksburg*, 185 U.S. 65, 83, and cases cited therein.

See also *Walla Walla* v. *Walla Walla Water Co.*, 172 U.S. 1, 7.

Connolly v. *Union Sewer Pipe Co.*, 184 U.S. 540, 544, 545.

Wherefore we submit that the Circuit Court had jurisdiction.

The Appeal was Properly made Directly from the Circuit Court to the Supreme Court.

We submit that the present case is, as to the essentials of jurisdiction in both the Circuit and the Supreme Court, on all-fours with the case of —

Walla Walla v. *Walla Walla Water Co.*, 172 U.S. 1.

The following is from the statement of facts on page 6:

> "A demurrer to the bill having been overruled, and a preliminary injunction having been granted pursuant to the prayer of the bill, the case subsequently went to a hearing upon the pleadings and proofs, and resulted in a decree perpetuating the injunction. From this decree defendants appealed directly to this court, pursuant to section 5 of the Circuit Court of Appeals act, *allowing such appeal in any case that involves the construction or application of the Constitution of the United States.*"

The Supreme Court not only confirmed the jurisdiction of the Circuit Court, but also took jurisdiction of the appeal.

See also —

American Sugar Refining Co. v. *New Orleans*, 181 U.S. 277.

Connolly v. *Union Sewer Pipe Co.*, 184 U.S. 540, 544, 545.

The Appeal was seasonably Taken and Entered.

Allen v. *Southern Pacific R.R. Co.*, 173 U.S. 479:

From headnote: "The sixth section of the act of March 3, 1891, c. 517, did not change the limit of

two years as regards cases which could be taken from Circuit and District Courts of the United States to this court." . . .

See also —

Holt v. *Indiana Mfg. Co.*, 176 U.S. 68:

This was an appeal from the Circuit Court of the United States to the Supreme Court.

The following is from the opinion: —

At pages 70, 71: "The decree of the Circuit Court was entered in March, 1896, and the appeal to this court was not taken until somewhat over one year and six months, though within two years, thereafter. In January, 1898, a motion to dismiss was made on the ground that section 1008 of the Revised Statutes, giving two years for the bringing of a writ of error, or the taking of an appeal, to review the judgments or decrees of the Circuit or District Courts, was repealed by the Judiciary Act of March 3, 1891. We did not concur in that view, and the motion was denied, though without an opinion. But in *Allen* v. *Southern Pacific Railroad Company*, 173 U.S. 479, the reasons will be found for our conclusion that *the limit of two years remained* unchanged."

See also —

Excelsior &c. Co. v. *Pacific Bridge Co.*, 185 U.S. at page 285:

"The case, being thus in proper condition for appeal, such appeal could be taken at any time within two years. *Allen* v. *Southern Pacific Railroad*, 173 U.S. 479; *Holt* v. *Indiana Manfg. Co.*, 176 U.S. 68."

The record shows the following facts relating to time of taking and entering appeal: —

The final decree, dismissing plaintiff's bill, was made and entered March 5, 1902. (R. 107, 131.)

The appeal was allowed and the bond approved and filed December 8, 1902. (R. 131.)

The assignment of errors was filed December 8, 1902. (R. 131.)

The appeal was entered and docketed in the Supreme Court of the United States January 2, 1903.

As the appeal was taken, entered, and docketed within two years from the date of the final decree in the Circuit Court, we submit that *the appeal was seasonably taken and entered.*

Concerning Special Grounds Alleged by Defendant as Barring Plaintiff's Right to be Heard on the Merits.*

Defendant's demurrer contained the following: —

> "*Second.* . . . that it appears by the bill that the complainant thereby seeks to undo and reverse in a court of equity what has been properly done within its jurisdiction by a court of law." (R. 58.)

. . . . . .

---

* All the questions so raised were decided by the Circuit Court in favor of plaintiff. As the defendant has filed no assignments of error we claim that we are entitled to have the decision of the Circuit Court upon these points in our favor affirmed without argument. As, however, we are unable to find decisive anthority upon this point, and we may therefore be mistaken in this claim, we beg to make the claim as a claim of right, and to offer the following argument upon these preliminary defences *de bene*, to be used in case the court should deny our said claim that we are entitled to have the decision of the Circuit Court upon these points in our favor affirmed without argument.

17436

"*Sixth.* That it appears by the bill that each and every Federal question thereby sought to be raised, or relied on as a ground of jurisdiction in this court, might have been raised by the complainant in the proceedings in the State court of Massachusetts set out in the bill, and properly reviewed by the judiciary of the United States in such proceedings, or might have been raised in this court, if at all, before trial of its case in the State court; and that by omitting then or there to raise any such question, and by its laches in the premises, the complainant is debarred and estopped from maintaining the present bill." (R. 58, 59.)

The questions above presented were fully argued in the hearing upon demurrer, and were disposed of in the opinion of the court thereon as follows: —

"The defendant demurs to the bill for want of jurisdiction, want of equity and on other grounds.

"*It is contended that on the face of the bill this is an attempt to review and retry here a case between the same parties already tried and determined in the State court.*

"*The answer to this is that the constitutional questions set out in this bill were not raised in the State court and could not have been drawn in question in that suit.*

"*Moore* v. *Sanford*, 151 Mass. 285.
"*Pitkin* v. *Springfield*, 112 Mass. 509.

"In *Moore* v. *Sanford*, the plaintiffs, in 1885, filed a petition under the statute for damages sustained by the taking of their lands, and in 1889 brought a bill in equity to test the constitutionality of the statute, and to set aside the taking as unconstitutional. In holding that the plaintiffs had a right, by an independent pro-

ceeding, to dispute the validity of the taking and the constitutionality of the act, the court said:

"'The plaintiffs were entitled to have the question of the constitutionality of the statute determined, and under their petition for damages they were, by necessary inference, compelled in that proceeding to admit that it was constitutional.'

"If the question of the constitutionality of the act of 1894 was not open to the complainant in the proceeding in the State court, the objection that the complainant should have raised the question in that suit falls to the ground, and constitutes no defence to the present bill.

"*Nor do we think that the complainant is chargeable with such laches as to bar its right to bring this bill.*

"*The bill was brought before the suit in the State court was finally determined, and before the acceptance by the complainant of the award.*

"*Moore* v. *Sanford, ubi supra.*" (R. 111.)

The court thereupon proceeded to consider the main question, and held, as stated in the headnote to the report of this case (85 Fed. Rep. 723), as follows: —

"A state statute, under which a water company is in effect compelled to convey its property to the city, under threat of municipal competition, and which in such case allows nothing for its franchise rights, or on account of its future earning capacity or good will, takes its property without due process of law, because without just compensation."

And thereupon the demurrer was overruled. (R. 113.)

The court had previously considered the same preliminary objections to jurisdiction upon the plaintiff's motion to dismiss, and had overruled the motion. (R. 96.)

These questions were presented to the court for the *third* time in and under defendant's petition for rehearing on demurrer. (R. 97.)

Under this petition they were again fully argued in briefs submitted by both parties.

The petition was filed April 14, 1898.

Plaintiff's brief was filed June 27, 1898, and on November 17, 1898, the petition for rehearing was denied. (R. 130.)

When, later, the constitutional question was argued, the same questions were presented for the *fourth* time, and with fulness and force; but the Circuit Court on that occasion, having already decided them three times, took no further notice of them, and by implication affirmed the decision and opinion already cited and quoted above.

We claim and submit that these questions were correctly decided as above by the Circuit Court against the defendant's claims and contentions.

As to defendant's claim that complainant, by its bill, seeks to undo and reverse what was done in the state court.

We submit that the above quotation from the opinion of the Circuit Court, and the authorities therein cited, are sufficient and conclusive to the point that the present case is *not* the same case as the case in the state court; that the constitutional questions could *not* have been presented in that case; and that *for that very reason, under the law and practice of Massachusetts, the plaintiff had a right to test in a different and independent proceeding, the constitutionality of the legislation involved, and that this could be done before the final determination of the proceeding under the statute and before the acceptance by the plaintiff of the award thereunder.*

And as the present bill was so brought, it was properly held that the Circuit Court had jurisdiction.

We may add that the case of *Moore* v. *Sanford*, 151 Mass. 285, has been adopted and followed in Massachusetts upon the points involved herein in —

Norcross v. *Cambridge*, 166 Mass. 508, at page 510.

As to defendant's claim that the plaintiff, by electing to proceed and proceeding before the commissioners and in the state court under the act of 1894, waived its right to question the constitutionality of the statute.

Undoubtedly there is abundant authority for the general proposition that one who claims that his constitutional rights are violated by a statute may be held to have waived those rights by doing various acts inconsistent with such claim.

But it is distinctly held to be law by the highest court of Massachusetts that such acts as plaintiff has done herein do NOT constitute such waiver. It is so held both in the case of —

Moore v. *Sanford*, 151 Mass. 285, —

above cited by the Circuit Court, and in the later case of —

Norcross v. *Cambridge*, 166 Mass. 508, at page 510.

Obviously, under those two cases the state court would have taken jurisdiction of the present bill if it had been brought there; and it is settled by the decisions of the present court that —

Where the federal and state courts have concurrent jurisdiction (1) a party litigant loses no rights by bringing his suit in the federal court; and (2) the federal court will apply to the case "the same principles, and its determination is governed by the same considerations, as if it had been brought in the proper State tribunal of the same locality."

These principles were clearly laid down in —

Ex Parte McNiel, 13 Wall. 238, at page 243, —

where the court said, —

> "This principle may be laid down as axiomatic in our National jurisprudence. A party forfeits nothing by going into a Federal tribunal. Jurisdiction having attached, his case is tried there upon the same principles, and its determination is governed by the same considerations, as if it had been brought in the proper State tribunal of the same locality."

See also —

Gormley v. *Clark*, 134 U.S. 338, at pages 348, 349, —

as to cases of equitable jurisdiction.

In —

Clement v. *Packer*, 125 U.S. 309, —

as the case involved the ownership of Pennsylvania land, the United States Supreme Court adopted the rule of Pennsylvania *decisions* (not statutes) relating to evidence establishing parties' rights, although that rule conflicted with the rule of the United States Supreme Court, and the case was brought in the United States Circuit Court.

That the Circuit Court was justified in relying upon *Moore* v. *Sanford* (151 Mass. 285) is further shown by the opinion in —

Halstead v. *Butler*, 140 U.S. 273, at pages 276, 277.

As in the present suit the title to real estate is involved, and the parties are both Massachusetts corporations, we submit that *Halstead* v. *Butler* is particularly applicable to the present case.

The jurisdiction of the Circuit Court attached because we claimed that our rights under the federal Constitution were violated. All other questions of fact and law involved are incidental to this.*

And, the jurisdiction having attached, we are entitled, as shown above, to the full benefit of the rules in *Moore* v. *Sanford*, more especially as, under the Massachusetts rule, we were *excluded* from questioning in the state court the constitutionality under our petition, and therefore, *we could not possibly have gone from the Supreme Court of Massachusetts to the United States Supreme Court.*

As, therefore, it is held in the Massachusetts cases above cited that such acts as plaintiff has done herein do *not* constitute a waiver of the plaintiff's right to proceed in another and independent proceeding to question the constitutionality of the statute, and as, under the decisions of the present court, we lose nothing by bringing suit in the federal court instead of the state court, and are entitled to have applied here the rule of the state court upon the point involved, — it follows that the plaintiff, by proceeding before the commissioners and in the state court under the act of 1894, did *not* waive its right to question the constitutionality of the statute, as it has done by its present bill in the Circuit Court.

The suit, as brought, is not only within the principles and lines laid down under the above Massachusetts decisions, but is within the limits approved by the present court in —

Chicago &c. Ry. Co. v. *Minnesota*, 134 U.S. 418, 459, 460.

Defendant cited against us in the Circuit Court —

Electric Company v. *Dow*, 166 U.S. 489, —

affirming that it "is conclusive and is enough on this point."

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* *Osborn* v. *United States Bank*, 9 Wheat. at star pages 821, 822, 823.

An examination of that case shows that it *is* "conclusive and enough" on a *different* point, to wit, that if the Water Company had relied upon a constitutional (a federal) point *in its proceeding under the statute in the state court*, and if the state court (following *Pitkin* v. *Springfield*, 112 Mass. 509) had held that, by invoking the statute in a court proceeding, the Water Company admitted the validity of the statute, the Supreme Court of the United States *would have followed* the decision of the state court, and *would have held* the Water Company estopped from denying the constitutionality of the statute.

But one ground of respondent's complaint against the complainant is that *complainant did* NOT *raise the question of constitutionality in the state court;* and therefore the conclusion which would have followed from *Electric Co.* v. *Dow*, *if* plaintiff had raised the question of constitutionality in the state court, does not apply.

We base our position on the Massachusetts decision of *Moore* v. *Sanford*, 151 Mass. 285 (affirmed in *Norcross* v. *Cambridge*, 166 Mass. at page 510), which, in part, is based upon *Pitkin* v. *Springfield*, and is supported in principle in the federal decisions shown *ante*, p. 51.

The case of *Electric Co.* v. *Dow*, 166 U.S. 489, only strengthens, we submit, our position.

We submit that in *Electric Co.* v. *Dow* the present court only followed the above rule as to adopting and applying the law of the state.

Applying this rule, we submit it is clear that under *Moore* v. *Sanford*, 151 Mass. 285, plaintiff was not estopped to try, in a different suit brought after it had invoked the statute of 1894, the constitutionality of that statute; and that under *Electric Co.* v. *Dow it is equally clear that the federal courts will follow the Massachusetts rule in this respect.*

As to defendant's claim that plaintiff is estopped by its deed, and that the plaintiff, by making the sale and deed

under the statute, waived its right to question the constitutionality of the statute.

Of course we do not dispute the general principle of estoppel by deed; but we submit that it does not prevent the grantor from showing that a deed which appears on its face to be voluntary was in law and in fact compulsory, and therefore obtained by duress, and that the grantor is entitled to the application of the law arising from establishing that the deed was obtained by duress.

See Bigelow on Estoppel (5th ed.) p. 583.

As to defendant's claim that plaintiff waived any rights or is estopped by the fact that the City, after receiving the deed and before the filing of plaintiff's bill, expended not less than $45,000 on the property. (R. 90 (*f*).)

It is to be noted that the stipulation in connection with the above also states that the City, from the date of the transfer, "received the revenues from the property on the basis of the old rates."

That such expenditure should not be treated as ground of waiver and estoppel, is, we submit, established in —

Allore v. *Jewell*, 94 U.S. 506, at pages 512, 513:

. . . "The improvements made have not cost more than the amount which a reasonable rent of the property would have produced, and the complainant, as we understand, does not object *to allow the defendant credit for them*. And as to the small amount paid on the execution of the conveyance, it is sufficient to observe, that the complainant received from the administrator of the deceased's estate only $113.42; and there is no evidence that he ever knew that this sum constituted any portion of the money obtained from the defendant. A decree must, therefore, be entered for a

cancellation of the deed of the deceased and a surrender of the property to the complainant, but without any accounting for back rents, the improvements being taken as an equivalent for them."

See also—

Cheney v. *Gleason*, 125 Mass. 166, at page 177.

These cases show that, instead of treating such expenditures as a basis of waiver or estoppel, they may be set off against the income received and which must be accounted for, or the court may impose any other equitable terms upon which the plaintiff can retake the property.

The cases there cited go to the extent of holding that where there is duress there is no estoppel, even though the party performing the act under duress did it with the full intention that it should be acted upon.

If we establish, as we claim, that the sale was compulsory in law as well as in fact, it will follow that such sale necessarily involved the making of the deed by which it was to be effected; and this court has already held that whatever is involved in the act required by the compulsion, is treated as part of that which is compulsory.

Swift Co. v. *United States*, 111 U.S. 22, at page 28.

Robertson v. *Frank Bros. Co.*, 132 U.S. 17, at page 24.

See also *post*, p. 73.

Indeed, we think it will be conceded by the defendant that the doctrine of estoppel by the sale or by the deed cannot apply if we show that the sale is compulsory in law; and we rely upon showing that the sale was compulsory in law.

As to the claim which defendant may make that the statute of 1894 was solicited and procured by the Water Company.

If such claim be made, we answer, —

If it be claimed that plaintiff is estopped by the fact that it itself petitioned to the legislature for an act which resulted in the act of 1894, we show that the Water Company did *not* petition for any such sale as is prescribed by the act of 1894.

The petition itself is set forth in full in the bill of complaint. (Exhibit F, R. 32.)

That petition contains no such rule of compensation as is found in the act.

The petition asked for the sale of the Company's franchise rights and other property, and left the matter of compensation to be determined as usual; and this, of course, must have resulted in giving to the Water Company compensation for *all* the franchise rights and other property included in the sale.

At the instance of the City the legislature inserted the novel provisions which resulted in taking all our property, with the right, if the statute could give it under the Constitution, to pay for only part of the property.

Moreover, this legislation contained, in effect, the threat that unless we offered our property within thirty days we should be ruined by an authorized competition from the City of Newburyport.

Under no principle of estoppel, then, can we be held responsible for the act of 1894.

We have examined a number of cases where parties were held to be estopped to question the constitutionality of a statute; but in such cases the parties were estopped from denying the constitutionality of what they themselves had petitioned for, etc. We have found no cases, and we know of no principle of law, intimating that a party may be estopped to question the constitutionality of the provisions of an act of the legislature where such provisions *were objected to by him*.

Bigelow on Estoppel (5th ed.) pp. 689, 691, 692, and note 1, p. 691.

We asked the legislature for bread; they gave us a stone. We submit we are not estopped to object to the stone, even if the giving of the stone was the result of our asking for bread.

As to the attempted defence of laches.

Rose's United States Supreme Court Digest, vol. 2, p. 1185, paragraph (*e*): —

"Whether laches are such as will bar relief depends on circumstances of each case.

"*Bryan* v. *Kales*, 134 U.S. 135, 33 L. 829, Bk. XI. U.S. Notes, 923; *Griswold* v. *Hazard*, 141 U.S. 288, 35 L. 678, Bk. XII. U.S. Notes 28; *Abraham* v. *Ordway*, 158 U.S. 420, 39 L. 1036, Bk. XII. U.S. Notes, 753."

We therefore prefer to postpone the consideration of this question until after the argument upon the main questions, which will show the circumstances of the case upon which the question of laches depends.

See *post*, p. 134.

Argument concerning the alleged violation of the Fourteenth Amendment.

The question under the Fourteenth Amendment was and is whether the plaintiff was deprived by the state of its property without due process of law.

First Assignment of Error, R. 131, 132.

Preliminary.

We may resort to the opinions of the court below to show "the grounds upon which the court below proceeded."

Loeb v. *Columbia Township Trustees*, 179 U.S. at page 483.

The Circuit Court held that "THE PLAINTIFF'S WHOLE POSITION HINGES ON THE QUESTION OF COMPULSION" (R. 123); and that the "CRUCIAL POINT" in determining that question was *whether the statutory threat of municipal competition "produced compulsion which amounted to duress."* (R. 123.) Later in the opinion the court said, —

> *"The whole question of compulsion or duress in this case turns upon whether municipal competition, actual or threatened, under the authority of the state, was justified by law."* (R. 124.)

The Circuit Court, after an extended examination of authorities, held (what the plaintiff did not there dispute), that when a franchise was obtained which is not exclusive the legislature has a right to authorize municipal competition. (R. 120.) Having cited and examined numerous authorities to that point, the Circuit Court *then obviously* ASSUMES *that what may be lawfully done may be lawfully threatened*, and, *without citing any authority therefor*, proceeds as follows: —

> "But if competition be lawful, threatened competition is lawful. And if it were lawful for the State to authorize municipal competition, it was not unlawful for it to threaten to authorize municipal competition." (R. 123.)

And, applying this conclusion to the question of compulsion in law, or duress, the Circuit Court held that the sale was not compulsory in law; that therefore there was no *taking;* and hence there was no violation of the Fourteenth Amendment. (R. 127.)

We shall undertake to show, in connection with an examination of the opinion of the Circuit Court, that in its treatment it ignored "the *collateral* question of obtaining a contract by threats," and that if the law relating thereto is

17442

applied, as settled alike by the Supreme Court of the United States and the Supreme Judicial Court of Massachusetts, the conclusion of the Circuit Court should be held erroneous.

No other point was decided by the Circuit Court against plaintiff's contention. There was, however, one other point which that court finally "assumed," without deciding, in plaintiff's favor; but upon which it showed a tendency to decide against plaintiff, viz., *whether or not the act of 1893 was void because the City voted* NOT *to purchase.*

In all other respects we submit that the opinion of the Circuit Court showed that we fully sustained our claim of alleged violation of plaintiff's rights under the Fourteenth Amendment.

It would seem, therefore, sufficient to show that the Circuit Court was in error in deciding the "crucial point" against plaintiff, and in failing to positively decide in plaintiff's favor the other point, viz., that the act of 1893 was void as claimed.

As, however, it might be held that we are bound to show the error of the court below, not merely in reaching its conclusion, but in the conclusion reached and set forth in its decree; and as the present court might hold that such conclusion was lawful even if the lower court's grounds therefor were erroneous, — we feel bound, out of abundant caution, to argue the entire case, — giving particular attention to what the Circuit Court called the "crucial point." *

I.

"DUE PROCESS OF LAW," UNDER THE FOURTEENTH AMENDMENT, REQUIRES COMPENSATION TO BE MADE OR SECURED TO THE OWNER OF PRIVATE PROPERTY TAKEN UNDER THE AUTHORITY OF THE STATE FOR PUBLIC USE.

* See *post*, pp. 68 *et seq.*

THIS PROVISION CONTROLS A TAKING, WHATEVER MAY BE ITS FORM OR GUISE.

From Article XIV. of Amendments to the Constitution of the United States:

> "Section 1. Nor shall any state deprive any person of . . . property, without due process of law."

Plaintiff's main claim herein is that, as the legislation complained of has been construed by the state court, the state or commonwealth of Massachusetts deprived and deprives the plaintiff company of some of its property without due process of law; that this result is reached by reason of the fact that the sale, though voluntary in form, was compulsory in fact and in law; that the compulsion emanated from the state or commonwealth of Massachusetts, and constituted indirectly, and in effect, a *taking* of plaintiff's property; that thereunder some of the property of the plaintiff was taken without *any* compensation or provision therefor, and that such deprivation or taking of property is a taking "without due process of law."

As the Fourteenth Amendment contains no express language prohibiting the taking of private property for public use without just compensation, it is necessary to show that this provision, which is found in express words in the Fifth Amendment, has been read into the Fourteenth Amendment by the United States Supreme Court.

The case in which this was established is the frequently cited case of —

Chicago &c. R.R. v. *Chicago*, 166 U.S. 226, —

which adopted the conclusion reached by the late Mr. Justice JACKSON, while circuit judge, in —

Scott v. *Toledo*, 36 Fed. Rep. 395, 396, —

as follows: —

"The conclusion of the Court upon this question is, that since the adoption of the Fourteenth Amendment, the compensation for private property taken for public uses constitutes an essential element in 'due process of law,' and that without such compensation the appropriation of private property to public uses, **no matter under what FORM of procedure it is taken,** would violate the provisions of the Federal Constitution."

In *Chicago &c. R.R.* v. *Chicago*, however, what was under examination was a judgment of a state court claimed to be authorized by a *statute*.

The conclusion reached by the Supreme Court is stated as follows: —

"In our opinion, a judgment of a State court, even if it be authorized by *statute*, whereby private property is taken for the State or *under its direction* for public use, without compensation made or secured to the owner, is, upon *principle* and authority, wanting in the *due process of law* required by the Fourteenth Amendment of the Constitution of the United States, and the affirmance of such judgment by the highest Court of the State is a denial by that State of a right secured to the owner by that instrument."

166 U.S. at page 241.

This case has been so often cited and applied, both in the Supreme Court and in the circuit courts, that it can be no longer questioned, and it was accepted and applied by the Circuit Court (R. 113, 114) in the present litigation as establishing the point above claimed; viz., —

"Due process of law" under the Fourteenth Amendment requires compensation to be made or secured to the owner of private property taken for public use.

This provision controls a taking, whatever may be its form or guise.

II.

AS TO WHAT CONSTITUTES A TAKING UNDER THE FOURTEENTH AMENDMENT.

WHATEVER THE PROVISIONS OF THE STATE STATUTE, WE ARE ENTITLED TO GO BEHIND THE FORM AND TO SHOW THAT WHAT WAS AUTHORIZED BY THE STATUTE, AS CONSTRUED BY THE STATE COURT, WAS, IN EFFECT OR IN SUBSTANCE, A TAKING OF PLAINTIFF'S PROPERTY WITHOUT COMPENSATION, UNDER THE FORM OR GUISE OF A SALE WHICH WAS APPARENTLY VOLUNTARY, BUT WHICH WAS IN REALITY COMPULSORY IN FACT AND IN LAW.

We beg to call attention to the following cases, cited with approval by the Supreme Court in the case of —

Chicago &c. R.R. v. *Chicago*, 166 U.S. at pages 238, 239, —

including the quotation in the opinion in *Scott* v. *Toledo*, as follows: —

> "In *Scott* v. *Toledo*, 36 Fed. Rep. 385, 395–396, the late Mr. Justice JACKSON, while Circuit judge, had occasion to consider this question. After full consideration that able judge said: 'Whatever may have been the power of the States on this subject, prior to the adoption of the Fourteenth Amendment [page 139] to the Constitution, it seems clear that, since that amendment went into effect, such limitations and restraints have been placed upon their power in dealing with individual rights that the States cannot now lawfully appropriate private property for the public benefit or to public uses without compensation to the owner, and that *any attempt so to do*, whether done in pursuance of a constitutional provision or *legislative* enactment, whether done by the Legislature itself or *under delegated authority by one of the subordinate agencies of the State*, and whether done *directly*, *by taking the*

property of one person and vesting it in another or the public, or indirectly through the forms of law, by appropriating the property and requiring the owner thereof to compensate himself, or to refund to another the compensation to which he is entitled, would be wanting in that "due process of law" required by said amendment. The conclusion of the Court on this question is, that since the adoption of the Fourteenth Amendment compensation for private property taken for public uses constitutes an essential element in "due process of law," and that without such compensation the appropriation of private property to public uses, *no matter under what form of procedure it is taken*, would violate the provisions of the Federal Constitution.' To the same effect are *Henderson* v. *Central Passenger Railway*, 21 Fed. Rep. 358, and *Baker* v. *Village of Norwood*, 74 Fed. Rep. 997."

We ask the court specially to note that the prohibition of the Fourteenth Amendment is directed against any **legislative attempt** to take private property without compensation to the owner, whether done by the legislature itself **or under its delegated authority,** and whether done directly or indirectly through the forms of law; and that without *such compensation* the appropriation of private property to public uses, **no matter under what form of procedure it is taken,** would violate the provisions of the Fourteenth Amendment.

At this point we beg to submit that the authorities show clearly that in order to avail ourselves of the constitutional provision, we are not required to show that the alleged taking is under the usual open form of a taking by eminent domain. The Circuit Court said in its opinion, "the *taking* complained of in this case was by right of eminent domain, and not under the guise of taxation or police regulation." (R. 116.)

We submit, however, and show, that the taking complained of in this case was *not* by right of eminent domain, not merely because it was not in the usual form in which such right is applied, but because *it was wanting in the just compensation which is an essential element of eminent domain.*

> "The public, exercising the public power of compulsory purchase, otherwise called *eminent domain, whereof compensation is an essential element,* could authorize him as a public agent, in his natural or in his artificial capacity, to take as many of Eaton's rights of property as were necessary for a public use."
>
> *Thompson* v. *Androscoggin River Improvement Co.*, 54 N.H. 545, at page 557.

We admit that the taking complained of was "not under the guise of taxation or police regulation;" and we submit that we have a right to show that it was in any other form or guise, and that in this particular case *it was under the form or guise of a sale which was apparently voluntary, but which was really compulsory in fact and in law.* The above authority shows that the principle is equally applicable, whether done directly or indirectly by the legislature itself or by the municipal corporation, acting under the authority of the legislature, and whether done directly or indirectly through the forms of law and without regard to the form of procedure. That the present court has always reserved the right to pierce the guise under which a constitutional violation may be concealed is further shown as follows: —

> "*Loan Association* v. *Topeka*, 20 Wall. 655. In that case *a statute of Kansas was held invalid because by its provisions the property of the citizen under the*

GUISE* *of taxation would be* TAKEN *in aid of a private enterprise*, which was a *perversion* of the power of taxation."

The above statement of the case is the statement of the Supreme Court itself in —

Fallbrook Irrigation District v. *Bradley*, 164 U.S. at page 155, —

where the court further states, concerning the same case (*Loan Association* v. *Topeka*), —

"The ground of the decision was as stated, that the act **took** the property of the citizen for a private purpose, although under the **forms** of taxation." (164 U.S. at page 155.)

Here, we submit, is the highest authority for the proposition laid down by Mr. Justice JACKSON while circuit judge, and establishing the principle that —

Whether or not property is TAKEN *depends not upon the* FORM *of the transaction, but upon the* SUBSTANCE.

The same principle was early adopted in Massachusetts.

Austin v. *Murray*, 16 Pick. at page 126:

"The law will not allow the right of property to be invaded, under the *guise* of a police regulation for the preservation of health, when it is manifest that such is not the object and purpose of the regulation. Now

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* It is a violation of the Fourteenth Amendment to take the property of a railroad company under the "*guise*" of a *legislative regulation* as to mileage tickets.

Lake Shore &c. Co. v. *Smith*, 173 U.S. 684, 693.

we think this is manifest from the cases stated, in respect to the by-law in question."

That the court looks at the "essence and *effect*" of the state statute in determining the constitutional question of a taking is further expressly shown in —

Missouri Pac. R. Co. v. *Nebraska*, 164 U.S. 403.

All the so-called "railroad-rate cases" are based upon the principle that the **form** of the taking is immaterial, but that statutes apparently constitutional may, under the **form** of a constitutional regulation of rates, *be held by their unreasonableness and injustice, as applied*, to be **in effect** an unconstitutional taking of private property. Among these cases are the following, all depending upon the principles laid down in the case first mentioned below: —

Reagan v. *Trust Co.*, 154 U.S. 362.
Mercantile Trust Co. v. *Texas &c. Co.*, 51 Fed. Rep. 529.
Ames v. *Union Pacific Ry. Co.*, 64 Fed. Rep. 165.
Southern Pacific Co. v. *Board of Railroad Com'rs*, 78 Fed. Rep. 236.
Railway Co. v. *Dey*, 35 Fed. Rep. 866–868.
Capital City Gas Light Co. v. *Des Moines*, 72 Fed. Rep. 849.
Cotting v. *Kansas City &c. Co.*, 79 Fed. Rep. at page 679.

We submit, therefore, upon the above authorities, that we are entitled to go behind the *form* of the transaction involved in the present suit, and show that the sale was voluntary *only in form*, and "in essence and effect;" and was *in fact* and in law *compulsory;* and that in "*substance*," "*in essence and effect*," it was a *taking* of property of

the plaintiff company for public uses but *without compensation*.*

III.

IT IS NOT ONLY SETTLED, AS ABOVE SHOWN (II.), THAT THE OWNER OF PRIVATE PROPERTY MAY BE DEPRIVED OF IT BY STATE ACTION IN ANY FORM WHICH IS IN EFFECT OR IN SUBSTANCE A TAKING THEREOF; BUT IT IS ALSO SETTLED THAT A SALE WHICH IS COMPULSORY IN LAW UNDER A STATE STATUTE IS THE EQUIVALENT OF A TAKING BY THE STATE.

We do not need to go outside of Massachusetts decisions upon this point, for they hold clearly that a sale which is compulsory in law is the equivalent of a taking by the state. See —

Parks v. *Boston*, 15 Pick. 198, at page 208.
Norcross v. *Cambridge*, 166 Mass. 508, at pages 511, 512.†

In New Hampshire it is likewise held that a *taking* by eminent domain is the equivalent of a compulsory purchase.

In *Thompson* v. *Androscoggin River Improvement Co.*, 54 N.H. 545, the court said, at page 557, —

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* That questions of fact may be involved in the determination of the constitutional question without changing the essence of the case as one "arising under the Constitution of the United States," see Point VI. of plaintiff's brief upon motion to dismiss, and cases cited thereunder.

See also opinion of Chief Justice MARSHALL in —

Osborn v. *United States Bank*, 9 Wheat. *738, at pages *821–823.

† This happens to be the very case which approves (166 Mass. at page 510) *Moore* v. *Sanford*, 151 Mass. 285.

"How, then, could R. acquire the right to pour the river upon Eaton's farm through a cut which it would be an unreasonable use of his own land for him to make? By a *purchase, voluntary* or *compulsory*. The public, exercising the public power of **compulsory purchase** *otherwise called eminent domain, whereof compensation is an essential element*, could authorize him as a public agent, in his natural or in his artificial capacity, to **take** as many of Eaton's rights of property as were necessary for a public use."

The above extract is taken from the quotation in Lewis on Eminent Domain, p. 55, where the above case and the Eaton case are treated as leading cases.

See Lewis on Eminent Domain, at pages 48–56.

IV.

IT RESULTS FROM THE THREE PRECEDING POINTS THAT DUE PROCESS OF LAW UNDER THE FOURTEENTH AMENDMENT REQUIRES COMPENSATION TO BE PAID OR SECURED TO THE OWNER OF PRIVATE PROPERTY SOLD TO A MUNICIPAL CORPORATION FOR PUBLIC USE BY A SALE WHICH, AS REGARDS SUCH OWNER, IS COMPULSORY IN LAW UNDER THE STATE STATUTE WHICH AUTHORIZES SUCH SALE.

V.

AS TO WHAT CONSTITUTES LEGAL COMPULSION, AND ESPECIALLY COMPULSION BY A GOVERNMENT OR ITS OFFICERS; AND AS TO THE KIND OF COMPULSION WHICH CONSTITUTES DURESS, AND RENDERS INVOLUNTARY IN LAW (AS WELL AS IN FACT) WHAT APPEARS TO BE VOLUNTARY.

WHILE ORDINARILY WHAT MAY BE LAWFULLY DONE MAY BE LAWFULLY THREATENED, YET IF THE GOVERNMENT, OR AN OFFICER OF THE GOVERNMENT ACTING

UNDER COLOR OF OFFICE, THREATENS AN INDIVIDUAL WITH SERIOUS LOSS, UNLESS THE INDIVIDUAL WILL MAKE A CONTRACT TO DO SOMETHING NOT REQUIRED BY LAW, — DIFFERENT FROM THAT REQUIRED BY LAW, — AND IF THE CONTRACT IS MADE UNDER THE INFLUENCE OF SUCH THREAT, SUCH CONTRACT, THOUGH VOLUNTARY IN APPEARANCE, BECOMES THEREBY COMPULSORY IN FACT AND IN LAW, AND IS OBTAINED BY DURESS.

The Circuit Court held, as already stated, that "the plaintiff's whole position hinges on the question of compulsion" (R. 123); and that the "CRUCIAL POINT "in determining that question was — *whether the statutory threat of municipal competition produced compulsion which amounted to duress.*" (R. 123.) Later in the opinion the court said, —

> "*The whole question of compulsion or duress in this case turns upon the question whether municipal competition, actual or threatened, under the authority of the state, was justified by law.*" (R. 124.)

As the decision of the Circuit Court against us was based upon this point, we beg to discuss the point in connection with the Circuit Court's treatment of it.

Quoting and following certain decisions of the Supreme Court, notably *Hamilton Gas Co.* v. *Hamilton*, 146 U.S. 258, the Circuit Court held it to be settled law in the present case that *the legislature had the right to* AUTHORIZE *municipal competition.* (R. 116–120.)

The Circuit Court then held as follows: —

> "*If competition be lawful, threatened competition is lawful. And if it were lawful for the State to authorize municipal competition, it was not unlawful for it to threaten to authorize municipal competition.*
>
> "But it is urged, and *this is the* CRUCIAL POINT in the plaintiff's argument, that *the threat of competition pro-*

> *duced* COMPULSION *which amounted to duress, and, consequently, made* the sale by the company to the city not a voluntary but a compulsory act, and being compulsory its effect was a *taking* of the plaintiff's property without just compensation. *The plaintiff's whole position hinges on the question of* COMPULSION." (R. 123.)

[The italics, of course (excepting the word "taking," which was italicized by the court), are our own.]

We concede that, as the Circuit Court says, "this is the crucial point in the plaintiff's argument."

We submit it is equally true that what is quoted above is the crucial point in the argument or reasoning of the Circuit Court which caused it to reverse the position it took when it overruled defendant's demurrer and finally dismissed plaintiff's bill. We need, therefore, no excuse for fully presenting this point: and this, not merely as a matter of justice to the plaintiff in these two cases, but also because, as we shall show, the legislation here complained of was a new departure from the many attempts, skilful and unskilful, earlier made to despoil corporations by methods resorted to in the hope of evading the constitutional provisions which were created to protect individuals against the states.

While the Circuit Court reaches the conclusion that there was no compulsion in law in the present case, upon an examination of cases cited by the plaintiff, we beg the court to note, what the Circuit Court failed to note, that it is *not* always lawful for either an individual or the state to threaten what might be lawfully done; but that it is *unlawful* to *threaten, with a certain condition or conditions attached*, what *might* be lawfully *done, if not threatened;* or what might be lawfully threatened *if no condition were attached;* in short, that **the lawfulness of the threat may depend wholly upon the condition annexed to it; and that such condition may make such threat unlawful, and lead**

to the conclusion that the act performed by the threatened party under the influence of such threat is compulsory in law as well as in fact.

As to threats made by an individual.

Contracts may be avoided which are "obtained by the **threat of unquestionably legal acts."**

The above quotation is from the opinion of HOLMES, J., in —

Silsbee v. *Webber*, 171 Mass. at page 381.

The same opinion recognizes that "*ordinarily*, what you may do without liability you may threaten to do without liability."

The opinion also states just what we claim here:

> "When it comes to the COLLATERAL *question* of obtaining a contract by threats, *it does not follow that, because you cannot be made to answer for the act, you may use the threat.* . . .
>
> "Some of the cases go further, and *allow to be avoided contracts obtained by the threat of* **unquestionably lawful acts.** *Morse* v. *Woodworth*, 155 Mass. 233, 251. *Adams* v. *Irving National Bank*, 116 N.Y. 606. *Williams* v. *Bayley*, L.R. 1 H.L. 200, 210."
>
> Ibid. pp. 380, 381.

The case of —

Morse v. *Woodworth*, 155 Mass. 233, —

above cited by Mr. Justice HOLMES, is regarded throughout the country as a leading modern case upon duress by threats. We submit to the inspection of the present court that it negatives the alleged rule of law laid down by the Circuit Court as constituting the "crucial point" upon which that court decided the present case against the plaintiffs.

See also *Taylor* v. *Jaques*, 106 Mass. 291.

It is also to be noted that, presumably, the federal court is applying Massachusetts law to these cases, wherein the contestants are all Massachusetts parties. We ask nothing better than that this case be governed by the law of Massachusetts. We shall show, however, that the law of the present court is in accord with the Massachusetts law and with what we claim thereunder.

Further authority showing when it is unlawful for an individual to threaten what it would be lawful simply to do.

That a "threat is a threat of 'unlawful imprisonment when made for the sole purpose of inducing the execution of the contract or conveyance, even though the party was *guilty of the charge for which* prosecution was threatened, and the *demand made is that the person shall repair the effect of his guilt*," is held in England, Alabama, Illinois, Kansas, Massachusetts, Missouri, Nebraska, New York, Rhode Island, and Wisconsin.

See Amer. & Eng. Encyc. of Law (2d ed.) vol. x. pp. 343, 344.

The Massachusetts cases there cited are two of the cases we have cited above; viz., —

Morse v. *Woodworth*, 155 Mass. 235.
Taylor v. *Jaques*, 106 Mass. 291.

As to threats made by a GOVERNMENT, or its officers acting under color of office.

Upon this point the Circuit Court held as follows: —

"*Duress by the Government or its officers*, in this class of cases, is defined by the Supreme Court as 'moral duress not justified by law.' *Maxwell* v. *Griswold*, 10 How. 242, 256. It must be the pressure

* That one may be also criminally liable in Massachusetts who threatens what he could lawfully do without threat.

arising from unlawful acts or demands on the part of the Government or its officers to produce that constraint of will or action, or state of necessity or compulsion, which render acts voluntary in form, involuntary and void. *In this class of cases the test is, was the cause of the compulsion lawful or unlawful. If the compulsion be founded on lawful competition, or the threat of lawful competition there is no element of illegality about it. Such compulsion is justified by law.*

"The *whole question of compulsion or duress* in this case *turns upon whether municipal competition*, actual or *threatened, under the authority of the State, was justified by law.*" (R. 124.)

The Circuit Court then cites and quotes from four decisions of the present court as having been "relied on by the plaintiff," and as to these the Circuit Court held as follows: —

"In the Supreme Court cases relied on by the plaintiff it will be found that the compulsion or duress was based upon an illegal act or exaction, or threatened illegal act or exaction, by the Government or its officers." (R. 124.)

These four cases were as follows: —

United States v. *Tingey*, 5 Pet. 115, 129. (R. 124.)

Maxwell v. *Griswold*, 10 How. 242. (R. 125.)

Swift Co. v. *United States*, 111 U.S. 22, 28. (R. 125.)

Robertson v. *Frank Brothers Co.*, 132 U.S. 17. (R. 126.)

The Circuit Court's opinion then proceeds as follows: —

"In the above cases, which are cited by the plaintiff, it is seen that it is the element of illegality which

> lies at the foundation of this species of duress. In those cases the moral duress was caused by the illegal acts or demands of the Government or its officers. In the case at bar there was no moral duress not justified by law, *because it was lawful for the State to authorize, or threaten to authorize, municipal competition.*" (R. 126, 127.)

Now it is to be noted that the Circuit Court, while it uses the term "threatened illegal act or exaction," yet *fails to note that there is a distinction between the threat and the exaction.*

Again, using as an example the duress of the highwayman, who, pistol in hand, says, "your money or your life," we submit that obviously this contains a threat *and* an exaction. The threat, "your life," is the threat of murder, while the exaction "your money" is the compulsory taking of private property for private purposes. In such case, obviously, both the threat and the exaction are illegal. But an examination of the above authorities, under the subdivision that "contracts may be avoided which are obtained by the threat of unquestionably legal acts," shows that a threat may be lawful under certain circumstances, and yet may become unlawful when coupled with an exaction which would be lawful *if voluntary*, but which cannot be *required.*

The Tingey Case.

United States v. *Tingey*, 5 Pet. 115.

We claim and submit that a careful examination of this case, and an application of it to the present cases, will show the fundamental error of the Circuit Court in its conclusion that, although the sale in the present case was compulsory in fact, it was not compulsory in law.

For the conclusion reached in the Tingey case by the present court is that a *threat* made by an officer of the government under color of his office, *which in itself would be a lawful threat, when coupled with an exaction which is variant from what is required by law, makes the contract entered into under influence of such threat compulsory in law as well as in fact.*

In order to make sure of the correctness of this claim, we beg to repeat here the quotation made by the Circuit Court from the opinion in the Tingey case:

> "In the Supreme Court cases relied on by the plaintiff it will be found that the compulsion or duress was based upon an illegal act or *exaction*, or threatened illegal act or *exaction*, by the Government or its officers.
>
> "*United States* v. *Tingey*, 5 Pet. 115, 129, was a suit brought by the government upon a bond, variant from that prescribed by law, demanded of a public officer upon the peril of losing his office. Mr. Justice STORY, delivering the opinion of the court, said:
>
> "'The substance of this plea is, that the bond, with the above condition, variant from that prescribed by law, was, under color of office, *extorted* from Deblois and his sureties, contrary to the statute, by the then Secretary of the Navy, as the *condition* of his remaining in the office of purser, and receiving its emoluments. *There is no pretence then to say that it was a bond* VOLUNTARILY *given*, or that, though different from the form prescribed by the statute, it was received and executed without objection. It was *demanded* of the party, *upon the peril of losing his office;* it was *extorted* under *color of office*, against the *requisitions* of the statute. It was plainly, then, an *illegal* bond; for no officer of the government has a right, by color of his office, to require from any subordinate officer, as

> a *condition* of holding office, that he should execute a bond with a *condition different from that prescribed by law;* that would be, not to execute, but to supersede, the requisitions of law; it would be very different, where such a bond was, by mistake or otherwise, voluntarily substituted by the parties for the statute bond, *without any coercion or extortion by color of office.*'" (The italics are ours.) (R. 124.)

Note that the Circuit Court said, —

> "In the Supreme Court cases relied on by the plaintiff it will be found that the compulsion or duress was based upon an illegal act or *exaction*, or threatened illegal act or *exaction*, by the Government or its officers." (R. 124.)

Let us see what was the "threatened illegal act or exaction" in the Tingey case; or, to be more exact, let us see what was the threat and what was the exaction in the Tingey case.

1. The thing threatened was that the purser should lose his office and its emoluments. This threat, in and by itself, was lawful.

For the report shows (5 Pet. at page 117) that the Secretary of the Navy had the legal power to deprive the purser of his "office and emoluments;" and it would seem that, under the then existing circumstances, it was even his duty to do so. Thus the thing threatened was lawful.

2. The "*exaction*" was the "compulsion to give or furnish"* a bond containing a provision "variant from that prescribed by law" (*ut supra*), *i.e.*, "*different* from that prescribed by law." (5 Pet. 115, last paragraph of headnote.)

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* "Exaction . . . Compulsion to give or furnish." Webster's Dictionary.

(*a*) The thing exacted was a "bond *variant*," "*different* from that prescribed by law."

An examination of the full report of the case indicates that the bond exacted was simply a bond which would require the purser to account for moneys of the United States which might come into his hands in *addition* to those received by him as *purser*. Of course he was liable in law to account for *all* such moneys. The only bond which could be required of him, however, was a bond to cover such moneys as should be received by him as *purser*.

3. The threat was made by the Secretary of the Navy, a government officer of rank superior to the officer threatened, who was a purser in the navy, that the latter officer would be deprived of his office and pay unless he would submit to such exaction, that is, would give or furnish a bond "variant," "different," from that required by law. The court held that that threat made the bond so given illegal, and given under duress; and was therefore void.

4. The Supreme Court held that the thing exacted, namely, a bond "variant," "different," from that prescribed by law, would be valid, *if voluntarily given*.

5. The Supreme Court then connects the threat with the exaction, and reaches its conclusion of duress as follows: —

But when it was made known by an officer (the Secretary of the Navy) superior to the purser, that, unless the exaction was yielded to, — that is, unless he would give a bond "variant," "different" from that required by law, the thing threatened, — loss of office and pay, — would result; and when accordingly such bond was given, it was held by the Supreme Court to have been thereby "extorted under color of office." And the court's conclusion was, "*there is no pretence then to say that it was a bond voluntarily given*."

If the rule of law had been the rule as laid down by the Circuit Court in the present case, then the reasoning of the

Supreme Court in the Tingey case would have been applied as follows: —

1. It was lawful for the Secretary of the Navy to deprive the purser of his office and emoluments.

2. But if it was lawful for the Secretary of the Navy to deprive the purser of his office and emoluments, it was lawful for said Secretary to *threaten* to deprive the purser as aforesaid.

3. Therefore the bond given under such threat was voluntary in law even if it were compulsory in fact.

The conclusion actually reached, however, was that *the bond was given under duress*, because the threat was conditioned upon the purser's making or giving a *contract to do something variant from law, — not required by law; and which would also be lawful if done voluntarily*.

To render still more conspicuous the error of the Circuit Court upon this crucial point of the case in failing to consider the exaction as one of the elements in legal compulsion, and in treating the threat alone as constituting duress, we beg to place in parallel columns the exact propositions of the Circuit Court in the Newburyport case, and a paraphrase of the same in terms of the Tingey case.

What the Circuit Court said in the Newburyport case.	*Paraphrase, in terms of the Tingey case, of what the Circuit Court said in the Newburyport case.*
[1] "The plaintiff argues that the measure of compensation provided by the Act of 1894 was not justified by law, and that, consequently, the principle recognized in the above cases is applicable to the present case.	[The Circuit Court is not quite correct in the statement opposite. The plaintiff's argument is that plaintiff could not be required by law (and therefore that such requirement is not justified by law) to sell all of its property and receive in

payment the value of only *part of the property sold.* Turning now to the Tingey case, the parallel argument would be as follows:]

[1] It is argued that the exaction of a bond variant from that required by law was not justified by law.

[2] "But this is an attempt to connect things that are entirely distinct. The compensation to be paid for the plaintiff's property has nothing to do with the subject of duress.

[2] But this is an attempt to connect things that are entirely distinct. The exaction of a bond containing terms variant from that provided by law has nothing to do with the subject of duress.

[3] "It was not the want of just compensation, but the threat of municipal competition, which was the cause of the alleged duress.

[3] It was not the exaction of a bond variant from law, but the threat of loss of office and pay, which was the cause of the alleged duress.

[4] "To connect the alleged duress with the lack of compensation involves the proposition that the compulsion which forced the plaintiff to deed its property to the City was owing to the unlawful compensation provided by the Act of 1894, and not to the threatened competition by the City.

[4] To connect the alleged duress with a bond variant from law involves the proposition that the compulsion which forced the giving of such bond was owing to the exaction of a bond containing terms variant from that provided by law, and not to the threatened loss of office and pay.

[5] "The want of just compensation has no bearing

[5] The exaction of a bond variant from law has

on the question before us unless the plaintiff first establishes a duress not justified by law." (R. 127.)

no bearing on the question before us unless the plaintiff first establishes a duress not justified by law. [!]

That is to say, the Circuit Court reached a conclusion which is the exact opposite of the conclusion and decision of the Supreme Court of the United States in the Tingey case.

We submit we have here shown conclusively that the Circuit Court has made the fundamental, controlling error of considering the threat BY ITSELF instead of considering together all the essentials as laid down by the Supreme Court and shown by the above analysis.

The Tingey case cited and approved in subsequent authorities.

The case of *United States* v. *Tingey*, 5 Pet. 115, was decided in 1831.

As showing the extent to which it has been adopted and applied, we place in the footnote below a quotation from Rose's notes on United States Reports, vol. 3, at pages 161, 162.*

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*"OFFICIAL BOND. — A bond exacted by a public officer, under color of office and different from that required by law, is obtained by extortion, and void, p. 129.

"Cited, affirmed and followed upon this point in the following: *United States* v. *Humason*, 6 Sawy. 202, 203, F.C. 15,421; *Hawes* v. *Marchant*, 1 Curt. 139, 141, 143, F.C. 6,240; *Humphreys* v. *Humphreys*, 1 G. Greene, 484; *Boston* v. *Capen*, 7 Cush. 124; *Leona etc. Co.* v. *Roberts*, 62 Tex. 622. Cited and principle applied in *Constable* v. *National S.S. Co.*, 154 U.S. 78, 38 L. 916, 14 S. Ct. 1073, holding

The Tingey case was deliberately adopted as law by the Supreme Judicial Court of Massachusetts in 1851 in —

Boston v. *Capen*, 7 Cush. 116, at page 124; see pages 123–125.

The report shows that the case was fully argued by two of the most distinguished counsel of the Boston bar, Peleg W. Chandler, the then city solicitor, and Benjamin R. Curtis.

The present court has never overruled the Tingey case; and the Massachusetts court, so far as we know, has not

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invalid a contract exacted by a revenue officer from ship company, making it liable to consignee for loss of goods, as prerequisite of right to leave them on wharf: *United States* v. *Mynderse*, 27 Fed. Cas. 57; *United States* v. *Mynderse*, 11 Blatchf. 5, 7, F.C. 15,851, and *United States* v. *Humason*, 5 Sawy. 539, F.C. 15,420, both holding where bond exceeds in terms that required by statute, it is void as to such excess; *State* v. *Taylor*, 10 S. Dak. 184, 66 Am. St. Rep. 708, 72 N.Y. 408, holding excessive bond valid to statutory amount; *State* v. *Shirley*, 1 Ired. L. 603, bond taken by public officer not authorized to receive it, is void; *Janes* v. *Reynolds*, 2 Tex. 256, the element of fraud *colore officii* must exist; *Johnson* v. *Erskine*, 9 Tex. 5, conditions being more onerous than required by statute, bond is void. Compared in *Greathouse* v. *Dunlap*, 3 McLean, 312, 314, F.C. 5,742, to case where illegal bond is extorted from defendant imprisoned for want of special bail. Cited, *arguendo*, *United States* v. *Humason*, 7 Sawy. 263, 8 Fed. 79; *United States* v. *Jones*, 77 Fed. 720, 721, 722; *Territory* v. *Golding*, 3 Utah, 48, 5 Pac. 550; *Alston* v. *Alston*, 34 Ala. 25; *State* v. *Dews*, Charlt. (Ga.) 434; *Patterson* v. *Gibson*, 81 Ga. 805, 12 Am. St. Rep. 358, 10 S.E. 10."

since rejected the Tingey case; nor has it ever overruled or doubted the case of *Boston* v. *Capen*, in which the Tingey case was adopted and applied, and by which it became part of the settled law of Massachusetts. Are we not justified, then, in respectfully urging that we have a right to have the Tingey case and the Capen case applied in the present litigation?

We submit that if this be done, it is established under the above authorities that the Circuit Court was in error at the crucial point of its own argument; and that its conclusions there should have been as follows:—

That while "ordinarily, what may be lawfully done, may be lawfully threatened,"* yet if the government, or an officer of a government, acting under "color of office," threatens an individual with serious loss, unless the individual will make a contract to give or do something not required by law,—different from that required by law,—and if the contract is made under the influence of such threat, "there is no pretence then to say it was a" [contract] "voluntarily given;" but such contract is compulsory in fact and in law and is obtained by duress.

We submit it is worthy of note that, although the Circuit Court devoted several pages to an examination of authorities upon the undisputed point that where the local company's charter is not exclusive the legislature has a right to authorize municipal competition, yet the Circuit Court *failed to cite a single authority upon what is called the "crucial point."*

Anticipating that counsel for the defendant may repeat here what was offered to the Circuit Court upon the same point, we beg to state that in their brief upon the constitutional question they made the following claim: —

* See *Silsbee* v. *Webber*, 171 Mass. at page 381, quoted *ante*, p. 71.

> "It is not duress, unlawful compulsion, or the subject of any complaint in law, for one to ***threaten*** to do what he has a ***legal right*** to do."

[The italics are theirs.]

Note that this is merely the statement of what the Massachusetts court says is *ordinarily* true.

> "*Ordinarily* what you may do without liability, you may threaten to do without liability," —

but both the counsel and later the Circuit Court failed to note the *collateral* question of obtaining a contract by threats.

> "*When it comes to the collateral question of obtaining a contract by threats, it does not follow that, because you cannot be made to answer for the act, you may use the threat.*"

See opinion of HOLMES, J., in —

> *Silsbee* v. *Webber*, 171 Mass. at pages 380, 381, quoted *ante*, p. 71.

It was obviously this principle which the Supreme Court applied in the Tingey case. Whether or not it was the duty of defendant's counsel to do more than present and argue the ordinary rule, we submit that it was *error for the Circuit Court* not to go beyond the ordinary rule and not to dispose of the case upon the more particular question presented under the *collateral* question "of obtaining a contract by threats."

Counsel for defendant, in support of the general rule, cited ten cases to the Circuit Court; yet, in an opinion replete with the examination of authorities, that court cited no case whatever upon this "crucial point;" — a strong indication, we submit, that none of defendant's cases fully sustained the point.

We do not feel justified in taking time or space to examine them here. It should go without saying that none of the cases which we have cited above were amongst them. We beg, however, to present one of defendant's citations as an example; viz., —

Johnson v. *Reed*, 136 Mass. 421.

We submit that the above case does not go even to the extent of supporting the general claim that one has a right to threaten to do what he has a legal right to do.

Moreover, the case calls particular attention to the law that the doing of what one would ordinarily have the right to do is rendered unlawful when done "for the purpose of compelling the defendant to do some *collateral* thing which he could not lawfully be compelled to do."

136 Mass. at page 423.

In short, *this Massachusetts case furnishes an analogy directly in support of our above claim* and argument as to the scope and effect of the Tingey case.

The other three cases of duress by government or its officers referred to by the Circuit Court "as relied on by the plaintiff," were and are relied on particularly to meet objections which might be raised to the effect that, even if the threat of municipal competition originally produced legal compulsion, such compulsion was destroyed by plaintiff's subsequent acts, such as the giving of a deed, etc. These cases are examined elsewhere herein in connection with such points.

It is worth noting here, however, that the Circuit Court reached its erroneous unqualified conclusion that whatever may be lawfully done may be lawfully threatened, without reference to a single case cited by the defendant; also that this conclusion was apparently based upon four cases

cited by plaintiff concerning compulsion by government and its officers; and that not one of said four cases holds, either expressly or by implication, the rule thus asserted by the Circuit Court. We submit to the inspection of the present court that the most careful examination of these cases will fail to discover therein the rule or principle that whatever can be lawfully done can be lawfully threatened. In fact, in each of these cases the threat, either with or without other concomitants, *was held to produce duress;* and the Tingey case was, we submit, *in principle* on all-fours with the present case, and was based upon the rule which we have shown above, and under which, we claim and submit, it will be conclusively established by the following points that the sale provided in the statute, though voluntary in form and appearance, was in effect and in substance compulsory in fact and in law.

VI.

APPLICATION OF THE FOREGOING PRINCIPLES OF LAW TO THE PRESENT CASE.

A.

THE GOVERNMENT, THAT IS, IN THIS CASE, THE COMMONWEALTH OF MASSACHUSETTS, BY THE ACT OF 1894 (C. 474), IN EFFECT THREATENED THE PLAINTIFF WITH SERIOUS LOSS UNLESS THE PLAINTIFF WOULD, BY AN APPARENTLY VOLUNTARY SALE AND CONTRACT, DO SOMETHING NOT REQUIRED BY LAW.

B.

THE PLAINTIFF, UNDER THE INFLUENCE OF SUCH THREAT, DID WHAT WAS REQUIRED, AS ABOVE, TO WIT, MADE THE APPARENTLY VOLUNTARY SALE PROVIDED FOR IN THE ACT OF 1894, WHICH SALE INCLUDED THE DISPUTED

FRANCHISE RIGHTS FOR WHICH PLAINTIFF RECEIVES NO COMPENSATION.

C.

THE SALE BECAME THEREBY COMPULSORY IN LAW.

A.

That the government, that is, in this case, the Commonwealth of Massachusetts, by the act of 1894 (c. 474), *in effect threatened the plaintiff with serious loss unless the plaintiff would, by an apparently voluntary sale and contract, do something not required by law.*

We are entitled to show the substance and effect of the statute and its purpose, but not the motives of the legislature.

We have already shown (Point II., *ante*, p. 62) that we are entitled to go behind the form of the statute and to show what it was *in substance and effect;* and this was held particularly in determining questions of constitutionality, and especially as relating to alleged violations of the Fourteenth Amendment.

As establishing this point we cited —

Chicago &c. R.R. v. *Chicago*, 166 U.S. at pages 238, 239, and cases cited therein.
Loan Association v. *Topeka*, 20 Wall. 65.
Fallbrook Irrigation District v. *Bradley*, 164 U.S. at page 155.
Lake Shore &c. v. *Smith*, 173 U.S. 684, 693.
Austin v. *Murray*, 16 Pick. at page 126.
Missouri Pacific R.R. v. *Nebraska*, 164 U.S. 403.

It seems that in determining the constitutionality of a state act, its *purpose* will be taken into consideration,

though the motives * of the legislature in enacting the statute will not be considered.

Even so, the present court has held distinctly that —

The purpose of the statute must be determined by its natural and reasonable effect.

If, then, the court considers both the effect and the purpose, and ascertains the purpose from the effect, our inquiry is practically limited to the *effect* of the act, and the purpose will be inferred or deduced therefrom.

We submit that what we have claimed as to the purpose and effect is established in the two cases cited and quoted below.

Henderson v. *Mayor of New York*, 92 U.S. 259, at pages 268, 269:

"In whatever language a statute may be framed, its *purpose* must be determined by its *natural and reasonable effect;* and if it is apparent that the *object* of this statute, as judged by that criterion, is to compel the owners of vessels to pay a sum of money for every passenger brought by them from a foreign shore, and landed at the port of New York, it is as much a tax on passengers if collected from them, or a tax on the vessel or owners for the exercise of the right of landing their passengers in that city, as was the statute held void in the Passenger Cases.

"*To require a heavy and almost impossible condi-*

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* "MOTIVES OF LEGISLATURE. — It is not within the province of the judiciary to inquire into the motives actuating the law-making body."

6 Amer. & Eng. Encyc. of Law (2d ed.) p. 1087, giving a long list of federal and state authorities containing (note 5), *inter alia*, —

Ex parte McCardle, 7 Wall. 514.

Doyle v. *Continental Ins. Co.*, 94 U.S. 535.

tion to the exercise of this right, with the alternative of payment of a small sum of money, is, IN EFFECT, to *demand* payment of that sum. . . . It is a law *in its purpose and effect* imposing a tax on the owner of the vessel for the privilege of landing in New York passengers transported from foreign countries."

Collins v. *New Hampshire*, 171 U.S. 30, at pages 33, 34:

"The direct and necessary result of a statute must be taken into consideration when deciding as to its validity, even if that result is *not in so many words* either enacted or distinctly provided for. In whatever *language* a statute may be framed, its *purpose* must be determined by its natural and reasonable effect. *Henderson* v. *Mayor of New York*, 92 U.S. 259; *Morgan Steamship Co.* v. *Louisiana*, 118 U.S. 455, at 462. Although under the *wording* of this statute the importer is *permitted* to sell oleomargarine freely and to any extent provided he colors it pink, yet the *permission to sell*, when accompanied by the imposition of a condition which, if complied with, will effectually prevent any sale, *amounts in law to a prohibition*."

"*The courts are not bound by mere forms, nor are they to be misled by mere pretences. They are at liberty — indeed, are under a solemn duty — to look at the substance of things, whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority.*"

The above quotation is from the opinion of HARLAN, J., in —

Mugler v. *Kansas*, 123 U.S. at page 661;

and the opinion then proceeds as follows: —

"If, therefore, a statute *purporting* to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a *palpable invasion of rights* secured by the fundamental law, *it is the duty of the courts to so adjudge, and thereby give effect to the Constitution.*"

Ibid. at page 661.

It is likewise true that questions of duress are to be determined not merely upon the form of the language used, but upon what was said or done IN EFFECT.

In *Swift Co.* v. *United States*, 111 U.S. at page 28, the court, after describing what the internal revenue bureau said and did, proceeded, —

"This was in effect to say to the appellant, that unless it complied with the exaction, it should not continue its business; for it could not continue business without stamps and it could not purchase stamps except upon the terms prescribed by the commissioner of internal revenue."

Upon its finding of *what was thus said in effect*, the court held that the apparently voluntary payment was involuntary in law.

I. The municipal competition authorized by the statute meant serious loss to the plaintiff company, to wit, its inevitable damage and ruin.

This was recognized in the opinion of the state court in the proceedings there under the present statute.

"Of course, an offer by the Water Company, made under the threat of *municipal competition* and *to avoid ruin*, might be voluntary only in name." (R. 54.)

Similarly, in the Gloucester case, the state court, by Mr. Justice LORING, said, —

> "It is plain that *a private water company* organized for net profits *cannot hope to compete with a city*, which can rely upon taxes to supply a deficit in operating expenses. For that reason, it is also plain that if the legislature had not required the city to buy the water company's property, *the company's property would have been practically, though not legally, confiscated.*" (Gl. R. 85.)

In similar vein, the Supreme Court of Pennsylvania said, in —

> *White* v. *City of Meadville*, 177 Pa. St. at page 651, —

> "If anything be manifest, it is, that if two water mains be laid side by side on the same street, equally accessible to the householder on each side, conveying double the quantity needed, with double sets of hydrants, pumping stations, offices, salaries and expenses, one or the other must be abandoned. No community will pay double for any article of necessity or luxury. If the property holder must, by compulsory taxation, support the municipal system, he will not voluntarily support the private corporation system; such a conflict of interests will inevitably bankrupt the system which depends on the voluntary patronage of the public. We hesitate to assume, every Court is bound to hesitate long before assuming, the Legislature intends, by grants to distinct corporations for public purposes, there shall arise such conflict in the exercise of the franchises as will result in the practical destruction of property of any citizen without compensation. It is a cardinal rule of construction between older and younger grants of franchises, the sovereign

does not intend the younger shall infringe on the older; but to assume these franchises can be in existence and in operation at the same time, is to assume the Commonwealth has granted precisely the same thing to the municipality that it had already granted to the Water Company; for in a business view, the contemporaneous exercise of the franchises is impossible."

To the same effect see —

Westerly Water Works v. *Westerly*, 75 Fed. Rep. 181.

See also —

Ziegler v. *Chapin, Mayor &c.*, 126 N.Y. 342, —

where the New York court said as follows: —

"The proposal to annex the town of New Lots to Brooklyn had in it elements of danger to the water supply company. *If the city should parallel the existing mains and furnish its own supply, the company might easily be ruined*, and it was natural that the interest thus threatened should seek some measure of protection in the Annexation Act itself. It is not surprising, therefore, to find in that act provisions framed to meet the emergency. The plan adopted was to authorize a purchase by the city of the plant of the company and shut off the city's competition if it refused to buy."

The later decision of the present court in —

Walla Walla v. *Walla Walla Water Co.*, 172 U.S. 1, —

supports the above authorities. We quote, therefore, as follows (Ibid. 11): —

"We think, however, that it sufficiently appears that, if the city were allowed to erect and maintain competing water works, *the value of those of the plaintiff company would be materially impaired, if not practically destroyed.* The city might fix such prices as it chose for its water, and might even furnish it free of charge to its citizens, and raise the funds for maintaining the works by a general tax. It would be under no obligation to conduct them for a profit, and *the citizens would naturally take their water where they could procure it cheapest.* The plaintiff, upon the other hand, must carry on its business at a profit, or the *investment becomes a total loss.* The question whether the city should supply itself with water, or contract with a private corporation to do so, presented itself when the introduction of water was first proposed, and the *city made its choice not to establish works of its own.* Indeed, it expressly agreed, in contracting with the plaintiff, that until such contracts should be avoided by a substantial failure upon the part of the company to perform it, the city should not erect, maintain or become interested in any water works except the plaintiff's. *To require the plaintiff to aver specifically how the establishment of competing water works would injure the value of its property, or deprive it of the rent agreed by the city to be paid,* is to demand that it should set forth *facts of general knowledge, and within the common observation of men. That which is patent to any one of average understanding need not be particularly averred.*"

Under the above decisions it was unnecessary to introduce any evidence whatever as to the ruinous effect of the municipal competition threatened under the statute.

We showed, however, that the ruinous result to plaintiff was contemplated, even by the city itself, while it was at-

tempting to secure from the legislature the right to initiate and carry on such competition.

In the contest before the legislative committee of 1894, *the mayor of the city* testified before the legislative committee as shown by the affidavit of Thomas E. Major (one of the official stenographers), filed with the bill, showing that at such hearing Mayor Gurney testified upon cross-examination as follows: —

> "*Question.* When you go into competition it would be with the view of ruining the water company?
>
> "*Answer.* No, sir; but with a view of the protection of the citizens, *but I think that will be the natural effect, that* **the water company will be ruined.**
>
> "*Question.* Then the plan you profess to adopt is one which in your expectation **will involve the ruin of the company?**
>
> "*Answer.* **I do not see any other way for it; I do not think they can compete with the city.**" (R. 93.)

We now come to a point which has been extensively disputed and argued in both the state and circuit courts, but was not decided by either of them, and which it remains for this court to decide:

2. The statute (1894, c. 474) provided that the sale from the Water Company to the City should comprise the Water Company's franchise rights (1) to the use of the streets in supplying water, and (2) to collect water rates.

[Hereunder — that the act of 1893 became void by the City's vote not to purchase under that act.]

Such rights — franchises — were the PROPERTY of the Water Company.

It is not denied (as we understand it) that the terms of the statute both naturally and technically would include

what the plaintiff claims above; but *the City has claimed that the statute cannot be so construed* for the following reasons: —

(*a*) Because the Supreme Court of the state adopted the contrary construction, which is binding upon the Supreme Court of the United States.

(*b*) Because the City received a complete water franchise by the act of 1893, and was in possession of it thereunder when the act of 1894 was passed.

We, *per contra*, contend, —

(a) The Supreme Court of Massachusetts did NOT decide the question of construction whether or not the sale included the Water Company's right to the use of the streets in supplying water and to collect water rates, or whether the act of 1894 provided that the sale and deed from the Water Company to the City should comprise the same.

This is shown by the following quotation from the opinion of HOLMES, J.: —

"The chief complaint of the petitioner is that no allowance is made for its right to lay and maintain pipes in the streets and its right to collect water rates. *There was much discussion whether these are among the 'rights' which the city buys under sect. 1 of the act*, and, if so, whether they are embraced in the provision that the value of the property shall be estimated without enhancement on account of, among other things, the franchise of the company. *As bearing upon this there was a good deal of argument as to whether the statute of 1893, chapter 471, was in force, the city having voted not to purchase the petitioner's property as therein provided, but afterwards having voted to accept the act. We do not think it necessary to go into these considerations*, or even to examine with great accuracy how far the rights in

question have not been allowed for. The direction to 'determine the fair value of said property for the purposes of its use by said city' is clear enough without going into controverted questions." (R. 53, 54.)

Farther down on the same page of the opinion (R. 54) we find the state court expressly "*Assuming* that the act of 1893 was *not* in force."

We submit to the inspection of the present court that this position was not changed in the state court's opinion, and that obviously the state court did *not* decide that the disputed franchise rights were not included in the sale under the statute; and also did *not* decide that the act of 1893 was in force when the act of 1894 was passed, *but expressly assumed the contrary*.

Counsel for defendant have further claimed that the state court expressly held that the city did not acquire its franchise rights from the plaintiff.

It should be noted that *the precise question at this point is*, not where or how the city acquired all its franchise rights, but *whether the plaintiff's disputed franchise rights were included in the sale provided by the act of 1894*.

As the Circuit Court also did not decide the point, and anticipating that defendants may here repeat the claim and argument presented by them below upon this point, we beg, out of abundant caution, to state and answer it here:

"*The State court expressly held that the city did not acquire its franchise rights from the plaintiff*. The court discussed this question, and declared its conclusion in these words: 'It is plain that when once the purchase was made, *the Act of 1894 conferred upon the city directly, and not merely or at all as successor to the water company, the right to supply itself and its inhabitants with water*, as if under the act of 1893 in case the water company had not offered to sell

under that act. A similar answer may be made with regard to the right to charge water rates. "It is the statute, and not the company which originally constructed the [water works], which confers upon the local authority this right,"' citing to this proposition *Edinburgh Street Tramways Co.* v. *Edinburgh* (1894), A.C. 456, 464, 465. (Record, pp. 68, 69.)

"This decision of the State court, upon this question of the construction of the statute, will be taken as conclusive by the Federal courts."

Respondent's Brief on Hearing of the Merits, pp. 42, 43.

We submit to the inspection of the court that the language quoted does not sustain the defendant's claim.

We can find no language there holding that the City "did not *acquire*" its franchise rights from the plaintiff.

It should be noted that in the earlier part of the opinion the state court said, "there was much discussion whether these are among the 'rights' which the city buys under Sect. 1 of the act," and later said, ". . . We do not think it necessary to go into these considerations," etc. (R. 53, 54.)

What, then, did the state court mean in saying, "assuming that the act of 1893 was not in force, . . . still it is plain that *when once the purchase was made*, the act of 1894 conferred upon the City directly, . . . the right to supply itself and its inhabitants with water"? etc.

Construing the various parts of the opinion together, does not the state court say, in effect, *We do not need to decide, and do not decide*, whether or not the plaintiff's franchise rights were included in the sale under the statute? Whether they were included or not, and even if they were, yet *after the City purchased them* it could only *use* them under the statute of 1894 with all the implications that statute carried concerning the act of 1893.

Wherefore we claim and submit it is clear that the state court did *not* decide, expressly or otherwise, that the plaintiff's franchise rights were not included in the sale under the statute.

As the state court did not decide that the plaintiff's franchise rights were not included in the sale, it follows that any claim made by defendant that the present court is bound by any such [non-existent] decision, cannot be sustained.

Under the rule laid down by the present court it is the right and duty of the present court to construe these two state statutes upon the points not necessarily involved in the actual decision of the state court, whatever opinions may have been expressed thereon in the opinions of the state court and the Circuit Court.

See *Carroll* v. *Lessee of Carroll*, 16 How. 275, at pages 286, 287.
St. Louis R.R. v. *Terre Haute R.R.*, 145 U.S. 393, at pages 403, 404.
Pollock v. *Farmers' Loan & Trust Co.*, 157 U.S. 429, at page 575.

(b) The City's other ground for claiming that plaintiff's franchise rights were not included in the sale is that the City had already received a complete water franchise by the act of 1893 and was in possession of it thereunder when the act of 1894 was passed.*

Plaintiff claims the contrary.

Even if the City had other franchise rights, obviously that fact would furnish no reason for not paying the vendor Water Company wholly or partly for similar rights bought from it.

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* This point is not involved in the Gloucester case, as the only statute purporting to authorize municipal competition is the same statute which provides for the sale.

Moreover, the contest between the parties in the legislature is to be remembered; and we submit that the act of 1894 was obviously a novel * attempt to obtain the whole of plaintiff's property without paying for that part of plaintiff's property which had come from the state, to wit, these franchise rights.

At all events the statutory terms, "*all the rights, privileges*," etc. (sec. 1, R. 33), naturally and necessarily include these disputed franchise rights.

Neither the state court nor the Circuit Court has held or intimated otherwise.

To cut these franchises out of the broad terms which, in both the ordinary and technical use of language, include them, can only be done upon the highest, clearest, and most extraordinary grounds, none of which have been yet presented.

Nevertheless, — and again out of abundant caution, — in view of the possibility that the present court might consider the existence of a complete water franchise under the act of 1893 a reason for excluding the disputed franchise from the sale under the act of 1894, we beg to show —

That the act of 1893 became void by the City's vote thereunder not to purchase; and so was not in force when

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* Note that in the Gloucester case herewith argued the bill contains the following: —

"21. Plaintiff *further avers upon information and belief*

"(*a*) That the said act of 1895 (chap. 451) was *novel;* that *the only act at all resembling it* in the terms of the so-called 'sale' was the Massachusetts act of *1894* (chap. 474) the effect and constitutionality of which are still in litigation." (Gl. R. 17.)

The allegation was made as bearing on the question of laches.

the act of 1894 was passed, but that the act of 1893 was re-enacted by the act of 1894 and as modified thereby.

The language of the act of 1893, sec. 12, provides that the Water Company may notify the City, within sixty days after the passage of the act, of its desire to sell to the City its property; "provided, however, the legal voters of the City . . . *vote to purchase* the aforesaid property," etc.

Section 13 of the same act provided that —

> "after the vote provided for in section 12 of this act, or provided the . . . Water Company does not so notify the said mayor within sixty days, this act shall be submitted to the legal voters of the city . . . for their acceptance or rejection," etc.
>
> Acts of 1893, c. 471, secs. 12, 13. (R. 31.)

The City first proceeded to vote upon the question of purchase, and voted *not* to purchase, and then voted to accept the act; and thereafter, claiming to act under the authority of said act, employed an engineer to make surveys in reference to the establishment of an independent water supply. (R. 5, 90.)

The Water Company claims that the proper construction of sections 12 and 13 of the act of 1893 requires that an *affirmative* vote "to purchase" be held a condition precedent to the City's right to accept the act and to acquire the powers conferred thereunder.

The language is plain and needs no interpretation, and it is therefore unnecessary to inquire into the objects of the legislature in the enactment of the statute.

> *Ruggles* v. *Illinois*, 108 U.S. 526, at page 534.
> *Lake County* v. *Rollins*, 130 U.S. 662, 669, 670, 671.
>
> *Bate Refrigerating Co.* v. *Sulsberger*, 157 U.S. 1, 36, 37, 38:

At pages 36, 37: "In our judgment the language used is so plain and unambiguous that a refusal to recognize its natural, obvious meaning would be justly
*37 regarded as indicating a purpose to change *the law by judicial action based upon some supposed policy of Congress. But, as declared in *Hadden* v. *Collector*, 5 Wall. 107, 111, 'what is termed the policy of the government with reference to any particular legislation is generally a very uncertain thing, upon which all sorts of opinions, each variant from the other, may be formed by different persons. It is a ground much too unstable upon which to rest the judgment of the court in the interpretation of statutes.' 'Where the language of the act is explicit,' this court has said, 'there is great danger in departing from the words used, to give an effect to the law which may be supposed to have been designed by the legislature. . . . It is not for the court to say, where the language of the statute is clear, that it shall be so construed as to embrace cases, because no good reason can be assigned why they were excluded from its provisions.' *Scott* v. *Reid*, 10 Pet. 524, 527."

. . . "If the statute thus construed does not give to the inventor all the benefits he would like to have, the remedy is with another department of the government, and it is not for the courts to tamper with the words of a statute or, by a strained construction of
*38 *legislative enactments, the language of which is clear and explicit, to accomplish results not contemplated by Congress. This court, speaking by Chief Justice MARSHALL, in *United States* v. *Fisher*, 2 Cranch, 358, 385, said that where the meaning of the legislature was plain 'it must be obeyed.'"

See also —

Osborn v. *United States Bank*, 9 Wheat. at page *817.

The vote required by the language of section 12 was not a vote *upon the question* of whether the company would or would not purchase, but a " vote *to purchase* the aforesaid property."

We submit that there is no ambiguity in this language, and that it means, and can mean, only what it says, — that the requirement of the statute at this point was that " the legal voters of the City vote *to purchase;* " and further, that it was only *after* such an *affirmative* vote to purchase, or, in the words of the statute, " *after* the vote . . . provided for in section 12 of this act, or provided the . . . Water Company does not so notify the said mayor within sixty days," of its desire to sell, — that the city was authorized by section 13 *to vote at all upon the question of the acceptance of the act.*

If, however, other matters are to be considered in settling the construction of these sections, the following should be noted : —

1. That section 12 does not say that the question of whether the City shall purchase the property of the Water Company or not shall be submitted to the voters of the City, but unequivocally says " shall . . . vote to purchase," while in providing for the subsequent vote upon the acceptance the words of section 13 are that " this act shall be submitted to the legal voters . . . *for their acceptance or rejection*," and, lower down, provides a form of question to be voted upon.

Is not this the clearest possible indication that the legislature would have provided corresponding forms upon the question of purchase if the vote intended by section 12 had been a vote UPON THE QUESTION *of purchase, instead of the required affirmative vote to purchase?*

2. That the act of 1893 gave to the City different and additional sources of water supply than those possessed by

the Company, and also obviously the use of different streets and ways.

This will be seen at a glance by comparing section 2 of the act of 1880 (R. 19) with section 2 of the act of 1893. (R. 28.)

3. That the City *tried* to get the legislature to grant the City a water franchise without any requirement of purchase of the Water Company, but the Water Company, though not able to prevent the City's securing the desired franchise, *did* succeed in getting the provision from the legislature that the City should *not* have the franchise and rights it desired *unless* it should *first* buy out the Water Company upon the terms contained in its charter. In other words, the provisions of sections 12 and 13 of the act were inserted at the instigation of, and thus for the benefit of, the Water Company.

4. That the results of competition by the city without purchasing the Water Company's property must necessarily have caused the ruin of the Water Company.

That such municipal competition will effect the inevitable impairment or practical destruction of the local private company has been judicially noticed.

See *Walla Walla* v. *Walla Walla Water Co.*, 172 U.S. p. 11.

Gloucester Water Supply Co. v. *City of Gloucester*, 179 Mass. 365.

White v. *City of Meadville*, 177 Pa. St. at page 651.

Westerly Water Works v. *Westerly*, 75 Fed. Rep. 181.

Ziegler v. *Chapin, Mayor etc.*, 126 N.Y. 342.

And in fact the proposition was expressly admitted by the City to the legislature in the legislative contest resulting in the two acts involved herein.

See admissions of the mayor before the legislative committee. Stipulation, par. (*g*), (R. 91) and Exhibit (R. 93).

And in considering this very act the state court said,—

"Of course an offer by a water company, made under the threat of municipal competition and TO AVOID RUIN, might be voluntary only in name." (R. 54.)

We submit that the fact that the obvious result of municipal competition would be the ruin of the Company shows the absurdity of the City's contention that the "vote to purchase" under the act of 1893 might be fulfilled by a vote *not* to purchase, — a vote which would obviously destroy the Water Company, *unless it sold* to the City at the City's own price, *however inadequate that might be.*

5. That although the Water Company's petition assumed (R. 32) that the City's claim — that the act of 1893 was existing and in effect, and not void — *might* be sustained, and although the City claimed that the act of 1894 recognized the existence and validity of the act of 1893, neither of these facts, even if proved, can determine whether the act of 1893 was then existing and in effect, or was void; for —

The question of the existence of a law is not a legislative, but a judicial, question.

"The legislature cannot authoritatively declare what the law is or has been; that is a *judicial* function and appertains to the courts. The legislature has exclusively the power to make laws, and thus declare what the law *shall* be."

Sutherland on Statutory Construction, sec. 229, and numerous cases cited.

"The question as to the existence of a law is a *judicial* one and must be so regarded by the Courts of the United States," —

even if the state court declines to take the trouble to determine the existence of the law.

> *Town of Ottawa* v. *Perkins*, 94 U.S. at pages 268, 269.
>
> *Koshkonong* v. *Burton*, 104 U.S. 668, at pages 678, 679:
>
> "When counsel, in *Ogden* v. *Blackledge* (2 Cranch, 272, 277), announced that, to declare what *the law is, or has been*, is a judicial power, to declare what the law *shall be* is legislative, and that one of the fundamental principles of all our governments is that the legislative power shall be separate from the judicial, this court interrupted them with the observation that it was unnecessary to argue that point."

Plaintiff's Petition to the Legislature.

Although the Water Company claimed that the act of 1893 was void, as before shown, yet after the vote of acceptance of said act by the City the Company feared that the act *might* be held to have been legally accepted, and that its property would be damaged, ruined, and destroyed by the City's threatened action under the act, and so petitioned the legislature of 1894 for legislation which would protect the Company by requiring the City, before acquiring the rights provided for under the act of 1893, to purchase the franchise, property, and all rights and privileges of the Water Company.

This petition assumes, as we have said (see p. 103), that the act of 1893 *might* be considered as in existence and valid, but this assumption cannot determine the question, because that must be decided by *judicial* authority.

The same is true of any "legislative recognition of the existence and validity of the act of 1893," contained in the act of 1894.

We submit that *no statement in the act of 1894, even if affirmatively made (which it was not), as to whether or not the act of 1893 had taken effect and remained in existence up to the passage of the act of 1894, could be decisive of the question, or could give to the act of 1893, except as revived or re-enacted by the act of 1894, any force which the act of 1893 would not have had without such legislative declaration.*

We therefore submit that, upon the grounds above given, our claim as to the construction of the act of 1893 should be sustained; and that that act should be held to have become void upon the City's vote *not* to purchase, and that nothing contained in the Water Company's petition to the legislature, — Exhibit F (R. 32), — or in the act of 1894, c. 474, — Exhibit H (R. 33), — can have any weight in determining this question.

Wherefore we submit it results and remains that when the act of 1894 was passed the City of Newburyport did *not* possess a water franchise, and had *no* right to the use of the streets for the purposes of water supply, and *no* right to collect water rates; and that it is thus all the more clearly established that *these rights were included in the sale authorized by the act of 1894.*

The Circuit Court did not discuss or decide whether or not the disputed franchise rights were included in the statutory sale, and did not decide whether or not the act of 1893 became void by the vote not to purchase.

It remains to be noted that, while the Circuit Court did not decide whether or not the act of 1893 became void by the vote, it showed a tendency to adopt the construction claimed by defendant. Its opinion upon the point is as follows: —

> "The plaintiff contends that the *taking* in this case was wholly under the act of 1894, and that the act of 1893 never took effect, because the 'vote to purchase'

> the company's works, under section 12 of the act, was a condition precedent to the city's right to vote to supply itself and its inhabitants with water under section 13; and the city having voted not to purchase, the act failed, and, consequently, the subsequent vote by the city to accept the provisions of the act was nugatory. This construction seems contrary to the intent and purpose of the act. The natural and reasonable construction of sections 12 and 13, looking at the whole act, is that the city should first decide whether it would purchase the plaintiff's works before determining whether it would build works of its own. *For the purpose of our present inquiry, however, it is unnecessary to pass upon this question.*" (R. 120.)

We submit that obviously the point was not fully considered by the court, and that the admitted *dictum* contained in the above quotation is controlled by the grounds and authorities we have presented above.

These rights of the Company were franchises and were thus the property of the Water Company.

Boston &c. v. *Salem &c.*, 2 Gray, at page 35, and cases cited.

See also *Williston Seminary* v. *County Commissioners*, 147 Mass. at page 430.

Monongahela Navigation Co. v. *United States*, 148 U.S. at pages 327, 328.

Wherefore we submit we have shown that the sale (which we shall show to be compulsory) included the Water Company's right to the use of the streets in supplying water and to collect rates; in short, all its franchise rights except its right to be a corporation, and the act of 1894 (c. 474) provided that the sale and deed from the Water Company to the City should comprise the same, and

that such rights — franchises — were the property of the Water Company.

3. The sale provided by the statute included something not required by law, that is, it included franchise rights belonging to the Company, which, under the terms of the sale, though included therein, were not to be paid for. Such a sale could not be required by law.

We have shown in the preceding subdivision of this point that, under the statute, the sale included the franchise rights to the use of the streets, and to collect water rates. [And [redacted] that the deed of the Company included these specifically, see par. 26, R. 50.]

No compensation was made or secured by the statute to the Water Company for a valuable part of the property included in the sale, viz., the right to the use of the streets and to collect water rates.

This appears from the decision of the Massachusetts Supreme Court. (R. 53, 54.)

The commissioners excluded these franchise rights from valuation, and the award did not contain any compensation whatever for such rights.

> "Sect. 1, chap. 474, in terms directs us to put a fair value upon the property for the purposes of its use by the city, and further provides that this value shall not be enhanced on account of the future earning capacity or good will, or the franchise of the company. To determine the fair value of the property for the purpose of its use by the city, as to any part that had any value in use to the city, we have valued the same at its value for that use at the time of the transfer. We have, as we think the statute so directs us, excluded from consideration the future earning

capacity and good will of the plant, *and have not valued any franchise right whatever which the company owned or held at the time of the transfer, except its rights to take water* as required and exercised by the taking under sect. 2, chap. 235, Acts of 1880. Neither have we, for the same reason, taken into consideration the earning capacity, whether past, present or future, or any income which the company had or might have derived from its plant." . . . (R. 9, 10).

. . . "'Our estimation of the value of the property, however, is based upon the theory that, *whether or not the company vested everything in the city*, described in clause 2, we still remain of the opinion that the elements of valuation which we have already therein stated are all that we can take into consideration in making our award, and we have therefore confined ourselves strictly to these elements of valuation, and do not include anything else. Upon the petitioner's request, we further add that, at the time of the transfer, the company, acting under chapter 235, Acts of 1880, had, since 1881, laid down in the streets of the city of Newburyport many miles of its piping, its hydrants, and other appliances used in connection with the water plant.

"'In estimating the value of the property transferred we allowed for the cost of reproducing this piping, these hydrants, and other appliances, as appears in clause 1 of our elements of valuation; *but we have not, in that element or in any other of the elements of valuation, taken into consideration or valued the exercise of this right, or the right itself, to so use the streets up to the time of the transfer;* and whether or not we should so value we leave to the determination of the court, further stating that upon the evidence presented to us, the exercise of this right and the right

itself was valuable.' (Report of Commissioners, pages 13–15.)" (R. 12.)

The commissioners' award was accepted by the highest court of Massachusetts (R. 56), although the opinion shows that "The chief complaint of the petitioner is that no allowance is made for its right to lay and maintain pipes in the streets and its rights to collect water rates." (R. 53.)

Wherefore it results that no compensation was made or secured by the statute to the Water Company for a valuable part of the property included in the sale, viz., the right to the use of the streets and to collect water rates.

In short, the statute provided that the Water Company should sell and convey its franchise rights to the City without receiving any compensation therefor.

That there is and can be no law requiring the Company to do this goes without saying.

On the contrary, the right to just compensation for private property is at the very foundation of our jurisprudence; and the sacredness of this right has caused the United States Supreme Court to read into, and make part of, the phrase "due process of law" in the Fourteenth Amendment, the provision requiring compensation for private property taken for public use. (See *ante*, Point I.)

Wherefore we submit it is established that the sale provided by the statute included something not required by law; that is, it included franchise rights belonging to the Company, which under the terms of the sale, though included therein, were not to be paid for. Such a sale could not be required by law.

Summary of the Foregoing.

We are now prepared to bring together these elements of the statute as it should be construed, and has been construed, and to show therefrom its effect.

We have shown that we are entitled to go behind the form of the statute and to show what it was in substance and effect.

We have shown that questions of duress are likewise to be determined not merely upon the form of the language used, but upon what was said or done *in effect*.

In order, then, to show what the statute was *in effect* we have shown further as follows: —

1. The municipal competition authorized by the statute meant serious loss to the Company, to wit, its inevitable damage and ruin.

2. The statute (1894, c. 474) provided that the sale from the Water Company to the City should comprise the Water Company's franchise rights (1) to the use of the streets in supplying water, and (2) to collect water rates.

[Hereunder — that the act of 1893 became void by the City's vote not to purchase under that act.]

Such rights — franchises — were the property of the Water Company.

3. The sale provided by the statute included something not required by law; that is, it included franchise rights belonging to the Company which, under the terms of the sale, though included therein, were not to be paid for. Such a sale could not be required by law.

Wherefore we submit that the authorization in the statute of municipal competition conditioned upon the Company's making such sale, which could not be required by law, was in effect that the government, the Commonwealth of Massachusetts, by the act of 1894, threatened the plaintiff with serious loss unless the plaintiff would, by an apparently voluntary sale and contract, do something not required by law.

That such statutory declaration of impending loss or ruin may be properly termed a threat is indicated by the lan-

guage of the Massachusetts court in the dictum already referred to.

> "Of course, an offer by a Water Company, made under the THREAT *of municipal competition and to avoid ruin*, might be voluntary only in name." (R. 54.)

The Circuit Court's reasoning at the crucial point is a holding in effect that the authorization of municipal competition was a *threat*.

> "But if competition be lawful, *threatened* competition is *lawful*. And if it were lawful for the State to authorize municipal competition, it was not unlawful for it to *threaten* to authorize municipal competition." (R. 123.)
>
> "But what was the compulsion in this case? It was the compulsion arising from the fear of competition, produced by what is termed the *threat* of the State to authorize municipal competition." (R. 123.)

And this is in accordance with the ordinary use of language. The primary meaning of threat is *pressure*. Its derived and present meaning is a *menace*. (Century Dictionary.) And by the same authority, a menace is "Threat or threatened; the declaration or indication . . . of a probable evil to come." (Century Dictionary.)

Duress by Submission to Choice of Evils.

Moreover, under the decisions of the present court, duress may be caused by a declaration of a probable or a certain evil to come, giving to the party threatened a *choice of evils*.

A submission "merely as a choice of evils" was held in—

> *Robertson* v. *Frank Brothers Co.*, 132 U.S. 17, at page 22, —

not to destroy the involuntary character of the act.

Coercion is intensified when the greater evil is that, unless the party submits, he must "discontinue the business," which is certainly the case where the corporation will inevitably be ruined. (Ibid. p. 23.)

B.

The plaintiff made the sale under the influence of such threat.

Having shown that the statute was in effect a threat of ruin to the plaintiff company, we submit that, under the decisions cited *ante* (under subdivision I. of this point, pp. 89 *et seq.*), it would have been unnecessary to put in any evidence whatever to show that the Water Company was influenced to make the sale by the statutory threat of municipal competition, which meant not only the Company's ruin, but also, — as indicated in the state court's opinion in the Gloucester case (Gl. R. 85), — *the practical confiscation* of its property.

We did, however, put in, under stipulation, the following: —

> "That the stockholders of the plaintiff Company voted to offer, sell and convey the Company's property to the defendant city, as set forth in paragraph 9 of the bill, *because of their belief that the city of Newburyport was liable to compete with the Water Company, and because they believed that such competition would ruin the Company.*" (R. 91.)

No attempt was made by the defendant to introduce any opposing evidence.

The conclusion of the Circuit Court that the sale, under the statutory threat of municipal competition, was compulsory in fact (R. 123), was thus inevitable.

C.

The sale became thereby compulsory in law.

For we submit it is established, under Point V., —

While ordinarily what may be lawfully done may be lawfully threatened, yet if the government, or an officer of the government acting under color of office, threatens an individual with serious loss, unless the individual will make a contract to do something not required by law, and if the contract is made under the influence of such threat, such contract, though voluntary in appearance, becomes thereby compulsory in fact and in law and is obtained by duress.

Conclusion of this Point.

And we submit that under the present point we have established all the above essentials of legal compulsion or duress: to wit, —

A.

The government, that is, in this case, the Commonwealth of Massachusetts, by the act of 1894 (c. 474), in effect threatened the plaintiff with serious loss unless the plaintiff would by an apparently voluntary sale and contract do something not required by law.

B.

The plaintiff, under the influence of such threat, did what was required as above, to wit, made the apparently voluntary sale provided for in the act of 1894, which sale included the disputed franchise rights, for which plaintiff receives no compensation.

We submit it follows, as a necessary conclusion, that —

C.

The sale became thereby compulsory in law.

We submit it likewise follows that we have established and sustained the third, fourth, and fifth assignments of errors, which are as follows: —

"III.

The court erred in this:

That, although it held that the sale of the company's property was compulsory in fact, it held that such sale was not compulsory in law.

IV.

The court erred in this:

That it did not hold that the act of 1894 (including the act of 1893 as re-enacted by the act of 1894,) was compulsory in law as well as in fact, and constituted duress.

The said act of 1894 is chapter 474 of the Massachusetts Acts of 1894; and the said act of 1893 is chapter 471 of the Massachusetts Acts of 1893.

V.

The court erred in this:

That it held 'that the threatened grant of such a franchise under the act of 1894 (admitting this to be the effect of the act) was a lawful exercise of legislative power.'" (R. 132.)

Anticipated Defences to the Foregoing.

The entire argument up to this point is based upon the assumption that plaintiff's franchise rights were not exclusive, and that it would therefore have been lawful for the state to have granted to the City competing water franchise rights *without more*.

While the passing of such an act, to go into effect at a later date, might have been in effect a threat of municipal competition, it would have been coupled with no exaction. It might then have come under the general rule, "*ordinarily* what you may do without liability, you may threaten to do without liability."

Silsbee v. *Webber*, 171 Mass. at page 381 (see *ante*, p. 71).

Obviously many more decisions can be found under the general rule than under the qualification under it which we have shown in point V. (*ante*, p. 68), as exemplified in the Tingey case and the cases following it.

We respectfully ask that, in examining any authorities which may be cited against us, the court may carefully note and preserve the distinction.

Some of the cases hitherto cited by the defendant against us, while on the surface having the appearance of contradicting our claims and conclusions, will be found, upon close examination, to contain elements distinguishing them from the authorities cited by us and from the present case.

We therefore beg to add here an —

Examination of cases heretofore cited by defendant upon duress, in anticipation that the same cases may be cited again.

French v. *Shoemaker*, 14 Wall. 314, 331:

It is enough to show that in this case the party complaining of the duress "accepted the advance of $5000 and the shares assigned him in the new organization as proposed." (Ibid. at page 333.)

If we had accepted the $275,000 awarded for part of our property, even under *Moore* v. *Sanford*, 151 Mass. 285 we should be deemed to have conclusively accepted the act.

The receipt and retention of the consideration conclusively distinguishes *French* v. *Shoemaker* from the present case.

The same may be said of respondent's citation —

United States v. *Huckabee*, 16 Wall. 413, 431:

In that case the vendors had accepted and kept the consideration, to wit, $600,000. (Ibid. p. 429.) Moreover, Huckabee had told Lyon he thought the title was good.

This was when Lyon proposed to buy, and asked if the title was good.

Again we say that if we had accepted the $275,000, or if the City had sold to somebody else, who, when proposing to buy, had asked us if the title was good, and if we had replied in the affirmative, we should certainly not be permitted to set up duress. Each of these two facts distinguishes clearly *United States* v. *Huckabee* from the present case.

Silliman v. *United States*, 101 U.S. 465:

In that case also, Silliman "thereafter, from time to time, received, without protest or objection, *payment* according to the diminished rate, and then brought suit against the United States for the difference between it and the original rate." (See headnote.)

This brings the Silliman case under the same distinction as the preceding. We certainly do not believe that if we had received and accepted the $275,000, any court would allow us to recover the difference between that and the value of our entire property as claimed hereunder.

Thorn Wire Co. v. *Washburn & Moen*, 159 U.S. 423, 444:

In that case, the complainant "preferred for prudential reasons to receive money and an acquittance of claims." (Ibid. p. 444.) That case is therefore likewise distinguished from the present case.

Respondent also cited —

White v. *United States*, 154 U.S. 661, 663:

This case is imperfectly reported, being in the "Appendix." It seems, however, from page 663, that the rights of a *third party* were involved, and that the plaintiff was trying to recover from the United States money paid to the *third* person, but it was the *third* person who had made the

claim, and not the United States. (Ibid. p. 663.) That case, therefore, we submit, furnishes no precedent for the present case.

Respondent also cited —

Carver v. *United States*, 111 U.S. 609:

In that case the person who claimed to have suffered duress agreed subsequently that what the government coerced him to pay was in fact fairly due upon a proper settlement of his accounts; and by way of supplement to, and in execution of, that agreement he accepted, as compensation for his services, or as a gratuity, a portion of the balance justly due from him. (Ibid. p. 612.)

We submit that those facts furnish no argument for lack of duress or for estoppel in the present case. The plaintiff in the present case has never agreed that the government had a right to make the plaintiff deed all its property and receive in payment therefor the value of only part of the property. Nor has the plaintiff received or accepted from the government or the City anything in payment therefor.

Lane & Bodley Co. v. *Locke*, 150 U.S. 193, 200, 201:

In that case the person claiming duress continued "amicable relations" for eight years "before he made a hostile move."

The court said, —

> . . . "The '*amicable relations*' he desired to have continued were evidently those out of which he was receiving a salary of $2000 per annum — a sum larger than he would have been entitled to if he had been in receipt of a royalty.
>
> "Courts of equity, it has often been said, will not assist one who has slept upon his rights, and shows no excuse for his laches in asserting them. The plain-

> tiff's excuse, in this instance, that he preferred for prudential reasons, to receive a salary from the defendant rather than to demand a royalty, is entitled to a less favorable consideration by a court of equity than if his conduct had been that of mere inaction."
>
> Ibid. p. 201.

In the present case plaintiff has had no "amicable relations" with the defendant since the legislative contest was first begun by the City's attempt to secure the right to municipal competition.

Under point XIV. we have shown that from the time of the passage of the act plaintiff has claimed that it was entitled to compensation for its franchise rights.

The state court said, —

> "The chief complaint of the petitioner is that no allowance is made for its right to lay and maintain pipes in the streets and its right to collect water rates." (R. 53.)

Under the law of Massachusetts, as laid down by *Moore* v. *Sanford*, 151 Mass. 285, the plaintiff's resort to the state court under the act did not take away plaintiff's right to question the constitutionality of the act in another and independent proceeding. As we show in point XIV. *post*, if a state court had held that under the act all of plaintiff's property was to be paid for, the act would have been constitutional, although the sale would still have been compulsory. For a compulsory sale with full, that is, just compensation, is the equivalent of a constitutional taking. (See *post*, Point IX.) As soon as the state court decided that the franchise rights were not to be paid for plaintiff brought its present bill.

Wherefore we submit that the inconsistent amicable relations which were made the basis of estoppel in *Lane & Bodley Co.* v. *Locke*, have not existed in the present case.

Respondent also cited —

White v. *United States*, 154 U.S. 661, 663:

It involved the rights of a third party, and we submit to the inspection of the court that it furnishes no authority for the present case.

VII.

THAT THE COMPANY GAVE A DEED WHICH WAS VOLUNTARY IN FORM IS IMMATERIAL. THE SALE REMAINS COMPULSORY IN FACT AND IN LAW.

Baker v. *Morton*, 12 Wall. 150:

A deed was given which was obviously voluntary in form; yet under the principles we have quoted and invoked herein it was held to have been compulsory, and the compulsion having been exerted by an individual, a federal court of equity avoided the deed for duress.

In —

Swift Co. v. *United States*, 111 U.S. 22, —

although the payments which were claimed to be compulsory had been accompanied with writings containing statements that they were "correct, complete, and true," signed by the party who tried to avoid them, yet upon the principles herein quoted and invoked the payments were still held to be compulsory.

In —

Robertson v. *Frank Bros. Co.*, 132 U.S. 17, —

it was claimed —

> "that the payment of the duties complained of was a *voluntary* payment, inasmuch as the plaintiffs themselves made the additions to the entries and invoices, and that, therefore, they cannot recover back any part of the money so paid."

Yet the court held that, notwithstanding these apparently voluntary writings by the party alleging compulsion, the payments were compulsory in law and in fact.

Upon this point the court said as follows: —

> "It is true that the thing done under compulsion in this case was the insertion of the additional charges upon the entries and invoices, but *that* NECESSARILY INVOLVED *the payment of the increased duties caused thereby*, and in effect amounts to the same thing as an involuntary payment." (Ibid. p. 24.)

It is to be noted that the court holds in effect that *whatever is involved in the act required by the compulsion is treated as part of that which is compulsory*. From which it follows that the Company's vote, offer, and deed, and delivery of the property thereunder, — being all statutory essentials of the sale, — are all to be regarded as compulsory in fact and in law.

VIII.

SUCH SALE (WHICH WAS COMPULSORY IN LAW) WAS FOR A PUBLIC USE OF THE PROPERTY.

That the sale was for a *public use* of the property is not disputed, and it is likewise settled law.

> "Whenever public uses require, the government may appropriate any private property, on the payment of just compensation. *That the supply of water to a city is a* **public purpose** *cannot be doubted*, and hence the condemnation of a water supply system must be recognized as within the unquestioned limits of the power of eminent domain. It matters not to whom the water supply system belongs, individual or corporation, or what franchises are connected with it,

— all may be taken for **public uses** upon payment of just compensation."

Long Island Water Supply Co. v. *Brooklyn*, 166 U.S. at page 689.

Aside from the question of laches, it is immaterial for us to show that the property was taken by, or under the authority of, the state for a public purpose. If it had been taken for a private purpose the taking would be unconstitutional even if just compensation had been provided.

Missouri Pacific Railway Co. v. *Nebraska*, 164 U.S. 403, 417.

As, however, in the present case the taking was for an obviously public purpose, we show under the question of laches, point XIV.,* *post*, that, although plaintiff knew from the outset that the sale was compulsory, yet the plaintiff could not know that the compulsory sale was without just compensation until the state court construed the act that provided payment for only part of the property included in the sale.

IX.

By such compulsory sale plaintiff's property was taken.

Again we call attention to the fact that, in order to sustain our contention, we are not obliged to show that the property was technically taken. The language of the Fourteenth Amendment is, —

"Nor shall any State *deprive* any person of . . . property without due process of law."

If by such compulsory sale the plaintiff was deprived by the state of its property without its having been technically

* See post, 137-139.

taken from it, we have obviously sustained our constitutional claim. As a matter of fact, however, the courts have used the term "taken" as an obvious abbreviation of the otherwise necessary phrase — *has been deprived of its property*. We submit, however, that we have shown that plaintiff was deprived of its property by a sale which was compulsory in law, and which was in effect a taking of plaintiff's property.

That the sale was **compulsory in law** is shown *ante*, point VI.

THAT A "TAKING" FOR PUBLIC USE UNDER A STATUTE IS THE EQUIVALENT OF A "COMPULSORY PURCHASE" BY THE PUBLIC HAS BEEN DISTINCTLY HELD IN THE FOLLOWING MASSACHUSETTS DECISIONS: —

Parks v. *Boston*, 15 Pick. 198, at page 208.
Norcross v. *Cambridge*, 166 Mass. 508, at pages 511, 512.

In New Hampshire it is likewise held that a *taking* by eminent domain is the equivalent of a compulsory purchase.

In *Thompson* v. *Androscoggin River Improvement Co.*, 54 N.H. 545, the court said, at page 557, —

> "How, then, could R. acquire the right to pour the river upon Eaton's farm through a cut which it would be an unreasonable use of his own land for him to make? By a *purchase*, *voluntary* or *compulsory*. The public, exercising the public power of **compulsory purchase, otherwise called eminent domain, whereof compensation is an essential element,** could authorize him as a public agent, in his natural or in his artificial capacity, to TAKE as many of Eaton's rights of property as were necessary for a public use."

The above extract is taken from the quotation in Lewis on Eminent Domain, page 55, where the above case and the Eaton case are treated as leading cases.

See Lewis, at pages 48–56.

See also the following from Cooley on Constitutional Limitations (6th ed.) p. 691, and cases cited thereunder:

"COMPENSATION FOR PROPERTY TAKEN.

"It is a primary requisite, in the *appropriation* of lands for public purposes, that compensation shall be made therefor. . . . And this compensation must be pecuniary in its character, because it is in the nature of a payment for a *compulsory purchase*.*

Obviously the terms "appropriation" and "eminent domain" in the above quotation are used as the equivalent of "taking."

These terms are also used as equivalents in the following definition of eminent domain: —

"Eminent domain is the right power of a sovereign State to *appropriate* private property to particular uses, for the purpose of promoting the general wel-

* "The effect of the right of *eminent domain* against the individual 'amounts to nothing more than a power to OBLIGE *him to sell and convey* when the public necessities require it.' JOHNSON, J., in *Fletcher* v. *Peck*, 6 Cranch, 87, 145. And see *Bradshaw* v. *Rogers*, 20 Johns. 103, per SPENCER, Ch. J.; *People* v. *Mayor &c. of Brooklyn*, 4 N.Y. 419; *Carson* v. *Coleman*, 11 N.J. Eq. 106; *Young* v. *Harrison*, 6 Ga. 130; *United States* v. *Minnesota &c. R.R. Co.*, 1 Minn. 127; *Railroad Co.* v. *Ferris*, 26 Tex. 588; *Curran* v. *Shattuck*, 24 Cal. 427; *State* v. *Graves*, 19 Md. 351; *Weckler* v. *Chicago*, 61 Ill. 142, 147." . . .

fare. It embraces all cases where, by authority of the State and for the public good, the property of the individual is *taken*, without his consent, for the purpose of being devoted to some particular use, either by the State itself or by a corporation, public or private, or by a private citizen."

Lewis on Eminent Domain, sec. 1.

To the same effect see the opinion of JACKSON, J., in —

Scott et al. v. *Toledo*, 36 Fed. Rep. at page 394:

. . . "The exercise of the power of eminent domain is, in legal effect, *nothing more than an enforced sale*, for the public benefit, at a fair price, to be ascertained in some proper mode, and to be paid the owner for the property so appropriated."

This is the opinion which, more than any other, seems to have been relied on by the present court in —

Chicago, Burlington &c. R.R. v. *Chicago*, 166 U.S. 238, 239.

Wherefore we submit it is established that by such compulsory sale plaintiff's property was taken.

X.

THE PROPERTY OF PLAINTIFF WAS TAKEN UNDER COLOR OF THE AUTHORITY OF THE STATE OR COMMONWEALTH OF MASSACHUSETTS.

We have shown (*ante*, Points I.–VI.) that the sale was compulsory, and that the compulsion was effected under the said act by the legislature of Massachusetts of 1894, including the said act of 1893, as re-enacted by the act of 1894.

The following is from the opinion in —

Barnett v. *Denison*, 145 U.S. 139: —

"*It is the settled doctrine of this Court that municipal corporations are merely agents of the state government for local purposes*, and possess only such powers as are expressly given, or implied, because essential to carry into effect such as are expressly granted; 1 Dill. Mun. Corp. sec. 89; *Ottawa* v. *Carey*, 108 U.S. 110; that the bonds of such corporations are void unless there be express or implied authority to issue them; *Wells* v. *Supervisors*, 102 U.S. 625; *Claiborne County* v. *Brooks*, 111 U.S. 400; *Concord* v. *Robinson*, 121 U.S. 165; *Kelley* v. *Milan*, 127 U.S. 139." . . .

Although municipal corporations are agents of the state for local purposes, where such agent, under color of an unconstitutional statute, commits acts of ruin and injury to the rights and property of plaintiff acquired under a contract with the state, a suit may be maintained against such agent, and such a suit is not a suit against the state.

Pennoyer v. *McConnaughy*, 140 U.S. 1:

"The other class is where a suit is brought against defendants who, claiming to act as officers of the State, and *under the color of an unconstitutional statute, commit acts of wrong and injury to the rights and property of the plaintiff acquired under a contract with the State.* Such suit, whether brought to recover money or property in the hands of such defendants, unlawfully taken by them in behalf of the State, or for compensation in damages, or, in a proper case where the remedy at law is inadequate, for an injunction to prevent such wrong and injury, or for a mandamus, in a like case, to enforce upon the defendant the performance of a plain, legal duty, purely minis-

terial — is not, within the meaning of the Eleventh Amendment, an action against the State. *Osborn* v. *Bank of the United States*, 9 Wheat. 738; *Davis* v. *Gray*, 16 Wall. 203; *Tomlinson* v. *Branch*, 15 Wall. 460; *Litchfield* v. *Webster County*, 101 U.S. 773; *Allen* v. *Baltimore & Ohio Railroad*, 114 U.S. 311; *Board of Liquidation* v. *McComb*, 92 U.S. 531; *Poindexter* v. *Greenhow*, 114 U.S. 270." (Ibid. p. 10.)

In such case —

"An unconstitutional law will be treated by the courts as null and void." (Ibid. pp. 13, 14.)

Where the act of an agent (for example, a board of commissioners) is authorized by a state statute, and it appears, "in essence and effect," that what is authorized by such act is a *taking* of private property for the *private use* of petitioners, **such taking is a taking by the state,** and if without the owner's consent is not due process of law, and is a violation of the Fourteenth Amendment.

Missouri Pacific Railway Co. v. *Nebraska*, 164 U.S. 403:

(Headnote:) "The taking by a State of the private property of one person or corporation, without the owner's consent, for the private use of another, is not due process of law, and is a violation of the Fourteenth Article of Amendment of the Constitution of the United States.

"A statute of a State, by which, as construed by the Supreme Court of the State, *a board of transportation is* authorized to require a railroad corporation, which has permitted the erection of two elevators by private persons on its right of way at a station, to grant upon like terms and conditions a location upon that right of way to other private persons in the neighborhood for

the purpose of erecting thereon a third elevator, in which to store their grain from time to time, is a *taking* of private property of the railroad corporation for a private use, in violation of the Fourteenth Article of Amendment of the Constitution of the United States."

(From Statement of Facts, at page 403:) "This was a writ of error to review a judgment of the Supreme Court of the State of Nebraska, awarding a writ of mandamus to compel the Missouri Pacific Railway Company, a corporation of Nebraska, to comply with an order of the Nebraska State Board of Transportation, which directed the company to grant to John W. Hollenbeck and others, the right and privilege of erecting an elevator upon the grounds of the railway company at its station at Elmwood."

(From Opinion, at page 417:) "This court, confining itself to what is necessary for the decision of the case before it, is unanimously of opinion, that the order in question, so far as it required the railroad corporation to surrender a part of its land to the petitioners, for the purpose of building and maintaining their elevator upon it, was *in essence and effect*, a *taking* of private property of the railroad corporation, for the private use of the petitioners. *The taking by a State* of the private property of one person or corporation, without the owner's consent, for the private use of another, is not due process of law, and is a violation of the Fourteenth Article of Amendment of the Constitution of the United States. *Wilkinson* v. *Leland*, 2 Pet. 627, 658; *Murray* v. *Hoboken Co.*, 18 How. 272, 276; *Loan Association* v. *Topeka*, 20 Wall. 655; *Davidson* v. *New Orleans*, 96 U.S. 97, 102; *Cole* v. *LaGrange*, 113 U.S. 1; *Fallbrook District* v. *Bradley*, *ante*, 112, 158, 161; *State* v. *Chicago, Milwaukee & St. Paul Railway*, 36 Minnesota, 402."

To same effect see —

Chicago &c. R.R. v. *Chicago*, 166 U.S. at page 239.

XI.

THE PLAINTIFF, A PRIVATE CORPORATION, IS A "PERSON" WITHIN THE FOURTEENTH AMENDMENT.

Minneapolis R.R. Co. v. *Herrick*, 127 U.S. 210.

Missouri Pac. Co. v. *Mackey*, 127 U.S. 205.

Minneapolis R.R. Co. v. *Beckwith*, 129 U.S. 26.

Charlotte &c. Co. v. *Gibbes*, 142 U.S. 386.

Lake Shore &c. Ry. Co. v. *Smith*, 173 U.S. 684, 690.

XII.

IT RESULTS FROM THE PRECEDING POINTS THAT THE PLAINTIFF HAS BEEN DEPRIVED OF ITS PROPERTY BY THE STATE OR COMMONWEALTH OF MASSACHUSETTS WITHOUT DUE PROCESS OF LAW.

THE ERRORS SPECIFIED IN THE FIRST, SECOND, SIXTH, AND TENTH ASSIGNMENTS OF ERROR (*post*, pp. 129, 130) ARE SHOWN; AND THE DECREE OF THE CIRCUIT COURT SHOULD BE REVERSED.

For we have shown —

1. *That the sale involved in the present suit, though voluntary in form as provided by the act of 1894, was* COMPULSORY (*ante*, Points I.–VI., this conclusion being reached in subdivision C of Point VI., *ante*, p. 113.)

2. *That the compulsory sale was for a* PUBLIC USE *of the property.* (See *ante*, Point VIII., p. 120.)

3. *That by such compulsory sale plaintiff's property was* TAKEN. (See *ante*, Point IX., p. 121.)

4. *That the property was taken under color of the authority of the state or commonwealth of Massachusetts under said act of the legislature of Massachusetts of 1894 including the act of 1893, as re-enacted by the act of 1894.* (See *ante*, Point X., p. 124.)

5. *That the taking is without just compensation, to wit, is without* ANY *compensation.* (See *ante*, Point VI., A 3, p. 107.)

6. *That under the Fourteenth Amendment "due process of law" requires compensation to be made or secured to the owner of private property taken for public use.* (See *ante*, Point I., p. 59.)

7. *That the plaintiff corporation is a "person" under the Fourteenth Amendment.* (See *ante*, Point XI., p. 128.)

8. *And finally that these constitute all the essentials required to establish our claim that the provisions of the act of 1894, relating to the sale and conveyance of the Water Company's right to the use of the streets and to collect water rates, are in violation of the Fourteenth Amendment.* (See Points I.–IV., *ante*, pp. 59–68.)

Wherefore we claim and submit it follows that the errors specified in the first, second, sixth, and tenth assignments of error are shown; and the decree of the Circuit Court should be reversed.

The said assignments of error are as follows: —

"I.

The court erred in this:

That it held, adjudged and decreed that the plaintiff has not been deprived of its property without due process of law in violation of the fourteenth amendment to the Constitution of the United States. (R. 131, 132.)

II.

The court erred in this:

That it held that the plaintiff failed to establish a taking of its property without just compensation under the authority of the State. (R. 132.)

VI.

The court erred in this:

That it did not find and hold that the act of 1894, (including the act of 1893 as re-enacted by said act of 1894) as construed by the highest court of Massachusetts in effect authorized a taking of plaintiff's property without just compensation; and that thereby and thereunder the State of Massachusetts deprived plaintiff of its property without just compensation in violation of the provision of the fourteenth amendment to the Constitution of the United States. The said act of 1894 is chapter 474 of the Massachusetts Acts of 1894; and the said act of 1893 is chapter 471 of the Massachusetts Acts of 1893. (R. 132.)

X.

The court erred in this:

That it ordered, adjudged and decreed that plaintiff's bill be dismissed with costs to the defendant." (R. 133.)

XIII.

THE PROVISIONS OF THE ACT OF 1894 (INCLUDING THE ACT OF 1893 AS RE-ENACTED BY THE ACT OF 1894) CONSTITUTE AN "ENTIRETY." THE PART OF THE ACT OF 1894 WHICH WE HAVE SHOWN TO BE UNCONSTITUTIONAL CANNOT BE SEPARATED FROM THE REMAINDER WITHOUT VIOLATING THE OBVIOUS INTENT OF THE STATUTE; THE ENTIRE ACT OF 1894 (INCLUDING THE ACT OF 1893 AS RE-ENACTED BY THE ACT OF 1894) IS THEREFORE UNCONSTITUTIONAL AND VOID.

As the City of Newburyport holds plaintiff's property under a statute which is unconstitutional and void, this court of equity should give such relief as is usually given to owners of property against other parties wrongfully in possession of the same.

In —

Louisville Water Co. v. *Clark*, 143 U.S. at page 16, —

the court determined, evidently upon inspection, that the act there under consideration "is to be regarded as an *entirety*."

The same thing was done as to the ordinance under consideration in —

Citizens' &c. Co. v. *City Ry. Co.*, 64 Fed. Rep. at page 656.

Moreover, it is of the very nature of the franchise rights involved that they be used *in connection with* the corporeal property embraced in the act.

We think this will be conceded by the City. At all events, we submit it is obvious that the entire act of 1894 (including the act of 1893 as re-enacted by the act of 1894) comprised an "entirety," "one entire scheme" of furnishing water to the City of Newburyport and its inhabitants, which cannot be separated into parts without violating the intent of the legislature.

Moreover, it is confirmed by the decision in —

People v. *O'Brien*, 111 N.Y. 1, at page 47.

Furthermore, the burden is upon the respondent to show that that which is clearly unconstitutional is separable from the rest of the statute under the principles laid down in the "Income Tax Case."

Pollock v. *Farmers Loan & Trust Co.*, 158 U.S. 601, and cases therein cited and quoted.

We are content to rely upon the following: —

"It is elementary that the same statute may be in part constitutional and in part unconstitutional, and *if the parts are* WHOLLY *independent of each other*, that which is constitutional may stand while that which is unconstitutional will be rejected. And in the case before us there is no question as to the validity of this act, except sections twenty-seven to thirty-seven, inclusive, which relate to the subject which has been under discussion; and as to them we think the rule laid down by Chief Justice SHAW in *Warren* v. *Charlestown*, 2 Gray, 84, is applicable, that if the different parts 'are so mutually connected with and dependent on each other, as conditions, considerations or compensations for each other, as to warrant a belief that the Legislature intended them as a whole, and that, if all could not be carried into effect, the Legislature would not pass the residue independently, and some parts are unconstitutional, all the provisions which are thus dependent, conditional or connected, must fall with them.' Or, as the point is put by Mr. Justice MATTHEWS in *Poindexter* v. *Greenhow*, 114 U.S. 270, 304: 'It is undoubtedly true that there may be cases where one part of a statute may be enforced as constitutional, and another be declared inoperative and void, because unconstitutional; *but these are cases where the parts are so* DISTINCTLY *separable that each can stand alone, and where the Court is able to see*, and to declare, *that the intention of the Legislature was that the part pronounced valid should be enforceable, even though the other part should fail.* To hold otherwise would be to substitute for the law intended by the Legislature one they may never have been willing by itself to enact.' And again, as stated by the same eminent judge in *Spraigue* v. *Thompson*, 118 U.S. 90, 95, where it was urged that certain

illegal exceptions in a section of a statute might be disregarded, but that the rest could stand: 'The insuperable difficulty with the application of that principle of construction to the present instance is, that by rejecting the exceptions intended by the Legislature of Georgia, the statute is made to enact what confessedly the Legislature never meant. It confers upon the statute a positive operation beyond the legislative intent, and beyond what any one can say it would have enacted in view of the illegality of the exceptions.'"

(Ibid. pp. 635, 636.)

In the Income Tax case the court applied the foregoing principles as follows: —

"*Third.* The tax imposed by sections twenty-seven to thirty-seven, inclusive, of the Act of 1894, so far as it falls on the income of real estate and of personal property, being a direct tax within the meaning of the Constitution, and, therefore, unconstitutional and void because not apportioned according to representation, ALL *those sections, constituting one entire scheme of taxation, are necessarily invalid.*" (Ibid. p. 637.)

Connolly v. *Union Sewer Pipe Co.*, 184 U.S. 540, at page 565:

"The principles applicable to such a question are well settled by the adjudications of this court. If different sections of a statute are independent of each other, that which is unconstitutional may be disregarded, and valid sections may stand and be enforced. But if an obnoxious section is of such import that the other sections without it would cause results not contemplated or desired by the legislature, then the entire statute must be held inoperative." . . .

It is to be noted that the bond in the Tingey case cov-

ered both what was permitted by law and what would have been legal if voluntarily given, but was not required by law. See:

United States v. *Tingey*, 5 Pet. at page 127.

It was held that the entire bond was given under duress and the government did not recover upon any part of it.

Wherefore we submit that we have established that the provisions of the act of 1894 (including the act of 1893 as re-enacted by the act of 1894) constitute an "entirety," and that the entire act of 1894 (including the act of 1893 as re-enacted by the act of 1894) is unconstitutional.

That an unconstitutional act is VOID, and protects nobody who has meddled with property under it, whether he be a private individual or an agent of the government, is elementary constitutional law.

Cooley's Constitutional Limitations (6th ed.) p. 222, and cases cited.

United States v. *Lee*, 106 U.S. 196, subdivision 3 of headnote; also pages 220–223.

Virginia Coupon Cases, 114 U.S. 270, at page 288.

Pennoyer v. *McConnaughy*; see *ante*, p. 125.

It follows from these decisions that, as the City of Newburyport holds plaintiff's property under a statute which is unconstitutional and void, this court of equity should give to plaintiff such relief as is usually given to owners of property against other parties wrongfully in possession of the same.

See Point XV., *post* 140.

XIV.

As to defendant's claim of laches.

We have already shown (*ante*, p. 57) that —

"Whether laches are such as will bar relief depends on circumstances of each case.

"*Bryan* v. *Kales*, 134 U.S. 135, 33 L. 829, Bk. XI. U.S. Notes, 923; *Griswold* v. *Hazard*, 141 U.S. 288, 35 L. 678, Bk. XII. U.S. Notes, 28; *Abraham* v. *Ordway*, 158 U.S. 420, 39 L. 1036, Bk. XII. U.S. Notes, 753."

Rose's United States Supreme Court Digest, vol. ii. p. 1185, par. (*e*).

We understand that the defendant does not make any claim as to plaintiff's lack of diligence in the period of time between the date of the state court's decision and the filing of plaintiff's bill. That decision was rendered June 14, 1897 (R. 53), and plaintiff's bill was filed July 21, 1897 (R. 129).

The defendant's claim upon this point is shown in the following quotation from its petition for rehearing on demurrer: —

"*The defendant did not urge or rely upon any laches after the proceedings in the State court and before the bringing of this bill.* It relied and still relies on the plaintiff's laches throughout the proceedings in the State court and during the entire period of two years preceding the bringing of the bill. It is plain that the question of the validity of the Massachusetts act of 1893 could have been raised by the plaintiff, by original proceeding in the State court, or in this court if it can now be raised here, prior to the passage of the act of 1894. It is equally plain that all the questions raised in the present bill, of the validity of the act of 1894 or of the act of 1893, could have been raised by the plaintiff by original bill in this court, if they can now be raised here, at any time after the passage of the act of 1894, and before the plaintiff began its proceedings in the State court. It is equally plain

that all questions of the constitutionality or validity of the valuation clause of section 1 of the act of 1894, which is the only part of the act complained of or involving any Federal question, could have been raised and availed of by the plaintiff in the proceedings which it actually brought in the State court, and a final adjudication of the Supreme Court of the United States obtained thereon in that proceeding. The laches relied on by the defendant is in omitting to raise any constitutional question throughout the whole course of that proceeding, and throughout the period of two years which it occupied, either in that or in this court, until that proceeding was terminated by an award of an amount unsatisfactory to the plaintiff." (R. 98.)

We beg to consider these claims *seriatim.*

As to defendant's claim "that the question of the validity of the Massachusetts act of 1893 could have been raised by the plaintiff, by original proceeding in the State court, or in this Court if it can now be raised here, prior to the passage of the Act of 1894."

We submit we do not need to answer why we did not go into court before the act of 1894 was passed, because we claim and show herein that it is under the act of 1894 alone that the sale was made which is the subject of the present litigation.

As to defendant's claim "that all the questions raised in the present bill, of the validity of the act of 1894 or of the act of 1893, could have been raised by the plaintiff by original bill in this court, if they can now be raised here, at any time after the passage of the act of 1894, and before the plaintiff began its proceedings in the State court."

It is to be borne in mind that "it is the rule of courts, both State and Federal, not to decide constitutional ques-

tions until the necessity for such decision arises in the record before the court."

Baker v. *Grice*, 169 U.S. 285, from headnote.

"It is matter of common concurrence — indeed, it is almost the undeviating rule of the courts, both State and Federal — not to decide constitutional questions until the necessity for such decision arises in the record before the court."

Ibid. p. 292.

If we had brought a bill in the Circuit Court before a decision under the petition was reached, would not the court have said, in effect, what was said in the railroad commission cases?

"*As yet the commissioners have done nothing.* There is, certainly, much they may do in regulating charges within the State, which will *not* be in conflict with the Constitution of the United States. *It is to be presumed they will always act within the limits of their constitutional authority. It will be time enough to consider what may be done to prevent it when they attempt to go beyond.*"

Railroad Commission Cases, 116 U.S. at page 335.

It is to be borne in mind that there were at least two essentials required in establishing our claim of unconstitutionality: —

1. That the sale was compulsory (in fact and in law); and —

2. That the statute did not provide payment for all the property comprised in the compulsory sale.

It may be assumed that we knew and could prove from the start that the sale was compulsory; but until the final

decision by the state court, we could not know that we should not receive payment under the statute for all the property comprised in the sale.

That the plaintiff contended for such construction is shown by the opinion of the state court. (R. 53.)

The act was *novel* as to the terms of payment. The commissioners construed it, as already shown, as not providing any payment for part of plaintiff's property; but at the same time they recognized the doubt and uncertainty of their conclusion by adding, —

> "Whether or not we should so value we leave to the determination of the court, further stating that, upon the evidence presented to us, the exercise of this right and the right itself was valuable." (R. 12.)

The report of the commissioners came before a single justice of the Supreme Court.

He recognized the novelty of the act and the doubtfulness of its construction by not rendering any decision at all and reserving the case for the full court. (R. 12.)

Suppose that the plaintiff had brought a bill in the Circuit Court alleging the unconstitutionality of the act of 1894 before the highest state court had rendered its decision.

Such bill could not have contained one of the averments essential to plaintiff's case, namely, that "under said act [as construed by the State court] said City was not bound to pay anything for the rights, and the exercise of rights, belonging to said Company, which said commissioners had found and reported to be valuable, but not included in said award of $275,000." (R. 13.)

We submit that obviously the Circuit Court would have held that the bill was prematurely brought; that it was entirely possible that the state court might decide, as was claimed therein by plaintiff, that these rights should be

paid for with the rest of the property; that if this were done, then the plaintiff would be paid in full for all its property even if the sale was compulsory in fact and in law. For the state had the right, under the Fourteenth Amendment to deprive plaintiff of its property or take its property in any form or guise, *provided* the plaintiff received therefor just compensation.

Plaintiff's bill, if thus brought, would have been therefore dismissed, either with or without prejudice, as prematurely brought. At all events, under *Baker* v. *Grice* and *Railroad Commission Cases* above cited, the Circuit Court could not possibly have held, before the decision of the state court, that that court would construe the statute in the way in which it did, and which alone furnishes us one of the essentials of our claim of unconstitutionality, namely, the lack of just compensation, indeed the lack of *all* compensation for plaintiff's valuable franchise rights.

Wherefore we submit that, in view of the special circumstances of the case, and under the decisions of the present court, we were entitled to wait, and that it was our duty to wait, until the state court decided whether or not the disputed franchises were to be paid for under the act. That we proceeded with due diligence as soon as the state court's decision was announced is not questioned.

Wherefore we submit that the defendant's claim of laches is not sustained.

As to defendant's claim that "It is equally plain that all questions of the constitutionality or validity of the valuation clause of section 1 of the act of 1894, which is the only part of the act complained of or involving any Federal question, could have been raised and availed of by the plaintiff in the proceedings which it actually brought in the State court, and a final adjudication of the Supreme Court of the United States obtained thereon in that proceeding." (R. 98.)

We submit that this claim is fully answered by the Circuit Court:

> " . . . The constitutional questions set out in this bill were not raised in the State court and could not have been drawn in question in that suit.
>
> *Moore* v. *Sanford*, 151 Mass. 285.
> *Pitkin* v. *Springfield*, 112 Mass. 509."
> (R. 111.)

We also object to defendant's above statement that we waited "until that proceeding [in the state court] was terminated by an award of an amount unsatisfactory to the plaintiff."

We have made no complaint as to the amount of the award for the property valued. Our complaint is that the compulsory sale included property for which the state court held that, under the statute, we were not entitled to any compensation, whether it was included in the sale or not.

Finally, we ask the court to note, not only that the present bill was promptly brought, but also that the court found and held as follows: —

> "The bill was brought before the suit in the State court was finally determined, and before the acceptance by the complainant of the award.
>
> *Moore* v. *Sanford, ubi supra.*" (R. 111.)

Wherefore we submit that the plaintiff was not guilty of laches.

XV.

THE SPECIFIC RELIEF WHICH MAY BE FINALLY GRANTED NEED NOT BE DETERMINED NOW. IT IS SUFFICIENT AT PRESENT TO SHOW THAT WE MAY BE ENTITLED TO ANY FINAL RELIEF IN RESPECT OF THE PROPERTY IN ISSUE. WE HAVE SHOWN THAT THE ENTIRE ACT OF 1894 IS UN-

CONSTITUTIONAL; THAT ALL ACTION THEREUNDER IS VOID. THE ENTIRE COMPULSORY SALE THEREUNDER WAS VOID. THE DEED THEREUNDER WAS OBTAINED BY COMPULSION. AND UNDER THE PRINCIPLES OF EQUITY WE ARE ENTITLED AT LEAST TO A CANCELLATION OF THE DEED AND A RESTORATION OF THE PROPERTY.

See —

Osborn v. *United States Bank*, 9 Wheat. star p. 738, at star pages 822, 823, 845.

That case involves constitutional questions mingled with other questions, and an injunction arising out of both classes of questions.

See also —

Baker v. *Morton*, 12 Wall. 150.

Story's Equity Jurisprudence (13th ed.) vol. i. note, pp. 28, 29; vol. ii. pp. 4–17; vol. ii. sec. 908.

That plaintiff may have prayed for too much, or even if plaintiff relies upon inconsistent positions for relief, does not leave him remediless in a court of equity where he has prayed, as here, for general relief.

See —

Citizens' Co. v. *City Ry. Co.*, 64 Fed. Rep. at page 658.

Tayloe v. *Merchants' Fire Ins. Co.*, 9 How. 390, p. 406.

Tyler v. *Savage*, 143 U.S. 79, at page 98.

That, in case of proper expenditure, if any, upon the property before suit is brought, the court may impose terms upon which plaintiff can retake the property.

See —

Allore v. *Jewell*, 94 U.S. 506, 512, 513.

Cheney v. *Gleason*, 125 Mass. 166, 177.

XVI.

AS THE SALE WAS COMPULSORY IN FACT AND IN LAW, THE STATUTE WAS IN VIOLATION OF THE FOURTEENTH AMENDMENT, EVEN IF THE FRANCHISE RIGHTS WERE NOT, UNDER THE STATUTE, INCLUDED IN THE SALE.

This was distinctly held by the Circuit Court; and if such holding be regarded as a *dictum*, we submit it is sustained by the reasoning and the decisions of this court cited in support of it.

> "At the outset, it may be observed, that if the plaintiff establish a *taking* of its property, under the acts of 1893 and 1894, it is clearly right in its contention that such taking was without just compensation. The act of 1894 provided that the valuation of the property should be 'the fair value of said property for the purpose of its use by said city,' and 'such value shall be estimated without enhancement on account of future earning capacity or good will, or on account of the franchise of said company.' A *taking* under an act providing such a method of compensation would be unconstitutional because without just compensation. It would be a taking 'without due process of law' in violation of the fourteenth amendment.
>
> "Where private property is taken for public uses, the legislature cannot fix the compensation, or determine in what it shall consist, or prescribe the rules and principles upon which it shall be computed. Lewis on Eminent Domain, sec. 461. When a taking has been ordered, the question of compensation is judicial, not legislative. The legislature cannot extinguish any part of such compensation, or in any manner 'interfere with the just powers and province of courts and juries to administer rights and justice.'
>
> "It is sufficient on this point to cite the language of the Supreme Court in two cases." (R. 114, 115.)

The Circuit Court then cited and quoted —

> *Monongahela Navigation Co.* v. *United States*, 148 U.S. 312, 327.
>
> *Reagan* v. *Farmers Loan & Trust Co.*, 154 U.S. 409, 410. (R. 115, 116.)

We have limited our argument, thus far, under the Fourteenth Amendment, to the claim in respect to the franchise rights which we show were included, under the statute, in the sale, but for which no compensation was provided. The Circuit Court shows above that a like argument may be made in respect to the Company's future earning capacity and good-will, which were also included in the sale. If it be held that the future earning capacity is included in the valuation of the franchise, it is obvious that at least the Company's good-will was not taken into account under the statute, and yet was included in the general term *property* transferred in the sale under the statute. Moreover, this cannot be affected by the tedious question whether or not the act of 1893 became void when the City voted not to purchase. We submit that clearly the Company's good-will passed under the act; that it was property; that no compensation was provided for it, and that our entire argument up to this point may be applied to good-will as well as to the franchise rights, and that this forms a separate and independent ground, holding that plaintiff has been deprived by the state of its property, to wit, of its good-will, without just compensation, and in violation of the provisions of the Fourteenth Amendment above relied upon in regard to due process of law.

Our answers to the defences hitherto attempted under the Reserved Power and the Police Power follow more naturally after the argument under plaintiff's claim con-

cerning the obligation of contracts. As to the ***Reserved Power***, see ***post***, p. 211; and as to the ***Police Power***, see ***post***, p. 221.

The Argument concerning Plaintiff's Claim under the Clause of the Constitution relating to the Obligation of Contracts.

Plaintiff's bill, as amended, contained the following allegation: —

> "'(*c*) That said legislation, as construed and applied as aforesaid, impaired and impairs the obligation of contracts belonging to said company and to its stockholders, in violation of section 10 of article I of the Constitution of the United States, and the plaintiff's rights thereunder.'" (R. 56.)

Preliminary.

It will be remembered that plaintiff's claim under the Fourteenth Amendment was decided by the Circuit Court, not upon a full hearing of the case, but upon the special hearing limited to the determination of the single question "whether or not the plaintiff has been deprived of its property without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States?" (R. 92.)

That question was decided against plaintiff by the court in the opinion of August 8, 1900. (R. 113.)

As that decision was only upon the single question under the Fourteenth Amendment, the plaintiff claimed the right to a further hearing upon its claim under the contract clause of the Constitution.

This right was conceded, and a special examiner was appointed January 10, 1901. (R. 130.)

March 22, 1901, the following stipulation was filed: —

"It is hereby agreed, if in the opinion of the court the testimony of the commissioners below referred to is competent evidence, is admissible at this stage of the case, and is material, that the commissioners appointed under Mass. St. of 1893, chap. 471, sect. 12, to value the property of the plaintiff company, if called as witnesses in this cause, would testify, without contradiction, that *they did not in fact value as part of said property the contract between the company and the city, of which a copy marked 'Exhibit D' is annexed to the plaintiff's bill, it being their opinion that the same in law could not be valued;* and it is also agreed that the same shall be dealt with in like manner as if said commissioners had so testified before the commissioner appointed by the court in this case, and as if said objections as to competency, materiality, and admissibility at this stage of the case had been duly taken before such commissioner and reserved for the consideration of the court; and it is also agreed that the petitioner at the hearing put the contract in evidence under objection; and that the commissioners viewed and examined the plant, two of them being engineers; and that evidence was submitted bearing upon the cost to the company of furnishing water, but no evidence of the quantity of water supplied to the city under the contract, nor any direct evidence of the cost of performing the contract or of its value to the company; that respondent's counsel in his closing argument asked petitioner's counsel if he waived the claim to have the contract valued, and the latter replied that he did not waive it and was not prepared to say what use he should make of it; that thereupon respondent's counsel proceeded to argue that the contract should not be valued; that

the petitioner's counsel in his closing argument mentioned the contract as one of the items of property which the company had parted with to the city, and urged, but not in this connection, that it was the duty of the commissioners to estimate the value of all the property of the company as one whole; and that in the proceedings in the State court upon the report of the commissioners the company made no claim that the contract should be or had not been valued, and raised no question concerning it.

"It is further agreed that all questions of relief shall await final determination of the question whether the plaintiff is entitled to any relief, unless the circuit court shall hold the evidence above recited to be admissible and material, and in view thereof shall decree that the plaintiff is entitled to relief, notwithstanding the decision rendered August 8, 1900." (R. 94.)

A hearing thereon was held May 22, 1901, before COLT and BROWN, JJ. (R. 130.)

The opinion, *per curiam*, was rendered January 21, 1902, and amended March 5, 1902. (R. 130, 131.) As amended, it appears R. 128.

The record prior to the filing of the stipulation showed, of course, the Water Company's contract with the City to furnish water for fire purposes, and the authority for making such contract. But the record did not clearly show that this contract had not been included in the valuation made by the commissioners and confirmed by the higher court in the state. The plaintiff's object was to show by testimony or by the stipulation that *the contract had not been valued in the award.*

This was upon the ground that in the Long Island case it was held that a contract is property, and, like any other property, may be taken for public use, but subject to the rule of just compensation.

"Second, a contract is property, and, like any other property, may be taken under condemnation proceedings for public use. *New Orleans Gas Co.* v. *Louisiana Light Co.*, 115 U.S. 650, 673. Its condemnation is *of course subject to the rule of just compensation.*" . . .

Long Island Water Supply Co. v. *Brooklyn*, 166 U.S. 685, at page 690.

Unless we showed to the court that the contract was not paid for under the award, it would obviously have been open to the court to hold that possibly it was included in what, under the award, was to be paid for; and that, as the state had the right to take the contract upon paying for it, we had failed to show any unconstitutionality in respect to the contract.

It will be noted that the stipulation presented the following preliminary questions: —

First, whether the testimony of the commissioners set forth in the stipulation was competent.

Second, whether the testimony of the commissioners was admissible at that stage of the case.

Third, whether the evidence offered by the plaintiff under the stipulation was material.

All these questions were presented fully to the Circuit Court, which first assumed that the testimony "could properly be offered at this stage of the case," but held that its admissibility then was a "question which we do not find it necessary to pass upon;" and later held that "after a full hearing upon the question of duress, this court has already decided that all the proceedings which took place under the act of 1894 were entered into voluntarily by the complainant in order to avoid great disaster arising from municipal competition. Our conclusion upon this point is

conclusive against the admission of the testimony offered by the plaintiff that the commissioners did not value the water contract." And thereupon the motion to enter the final decree was granted. (R. 128, 129.)

As the prior hearing was limited to the question under the Fourteenth Amendment, and as the Circuit Court itself conceded by its action that we were entitled to a hearing upon the question under the obligation of contracts, we submit that obviously we had a right to try fully all the material questions involved in the latter point; and that this could not be done without being permitted to show (as is done in the stipulation), that the contract for water for fire purposes was not to be paid for, although included in the sale. We think it will be apparent upon a reading of the *per curiam* opinion (R. 128, 129) that the Circuit Court simply rested upon its prior decision, and failed to distinguish and observe plaintiff's additional rights under the contract clause of the Constitution.

If the present court sustains our contention upon the Fourteenth Amendment, it may be unnecessary for it to consider our claim in reference to obligation of contracts; but if the court should deny our claim under the Fourteenth Amendment, *it becomes vitally important that the present point receive full and careful consideration.* We therefore beg to present here substantially the argument, with some alterations and additions, which was presented to the Circuit Court upon this constitutional claim, and which was obviously not considered by that court.

THE CONTRACT TO SUPPLY THE CITY OF NEWBURYPORT WITH WATER FOR FIRE PURPOSES.

The act of 1880, incorporating the plaintiff Company, authorized the City of Newburyport to contract for a supply of water for fire purposes for a term of years with the Newburyport Water Company. (Section 8 of chapter 235 of acts of 1880, R. 20.)

"Under date of Aug. 17, 1880, a contract was made, in accordance with the provisions of Section 8 of said Act of 1880 (Chapter 235)." (Bill, par. 4, R. 2.)

The answer "admits the establishment of a water system, and the making of the contract annexed to the bill as Exhibit D." (R. 60.)

A copy of the contract is marked "Exhibit D," and appears at page 26 of the record. It contains, *inter alia*, the following: —

". . . Whereas the party of the second part is desirous that its citizens should have the *best possible protection against fire*.

"NOW, KNOW ALL MEN BY THESE PRESENTS, That said Water Company, the party of the first part, agrees with said city, the party of the second part, as follows, namely:

"*First*. That it will furnish said city water as hereinafter provided, *unless sooner terminated by the purchase of its property by said party of the second part in accordance with Section 11 of Chapter 235 of the Acts of 1880*.

"*Second*. That it will lay and maintain a system of pipes in said Newburyport, substantially in accordance with the plan marked 'A, 1880,' deposited in the City Hall in said Newburyport; that the source of supply and size and quality of the pipes to be used shall be approved by the board of water commissioners of said city as provided in said act; that it will furnish and set one hundred and twenty-five double-nozzle fire hydrants at points indicated on said plan, and at any time or times, on request of the city council of Newburyport, will furnish and set additional hydrants at points indicated by said party of the second part, at the expense of said party of the first part, provided that the whole number of hydrants shall not

exceed one hundred and fifty; that it will at all times maintain a *head of water* NOT LESS than one hundred and twenty-five feet above tide water, and will *furnish* and maintain *a* FULL *supply of water for fire purposes during the existence of this contract.*

"And in consideration of the above, the party of the second part agrees to pay therefor to the party of the first part the sum of six thousand dollars *in each and every year during the existence of this contract*, payable in half-yearly payments in January and July. And it is agreed that said term of twenty years shall begin at such time as said company shall have so far completed its works as to be able to comply with the terms of this contract and shall notify said city that it is ready to furnish said water, and that said date shall not be later than the first day of January, A.D. 1882." (R. 26, 27.)

Other averments in the bill relating to said contract appear in the record. (Bill, pars. 4, 5, and 6, R. 2, 3.)

The Preliminary Questions.

First.

THAT THE TESTIMONY OF THE COMMISSIONERS SET FORTH IN THE NEW STIPULATION IS COMPETENT.

Deferring, for the present, consideration of whether or not such testimony, if admissible, was admissible *at that stage of the case*, we submit that the competency of such evidence is clearly established by the case of —

Bridge v. *Gray*, 14 Pick. 55.

The question in that case was whether or not the evidence of a foreman of a jury was admissible in another trial to show that a certain claim had not been consid-

ered by the jury in their verdict and was not included therein.

See headnote; also opinion of Chief Justice SHAW, 14 Pick. at pages 59, 60.

We submit that obviously the province of a commissioner is, on the side of fact, the same as the province of the jury; the province of the *chairman* of commissioners being, on the side of fact, substantially that of *foreman* of the jury. The stipulation says, "The commissioners . . . if called as witnesses in this cause would testify, without contradiction," etc. The above statement of course includes the testimony of the *chairman* of the commissioners, and is, in effect, the same as the testimony of the foreman of a jury.

The record in the present case prior to the new stipulation showed that the commissioners valued "3. *The personal property.*" (R. 10.) At one of the hearings defendant argued that, as the contract was clearly personal property, it was presumably included in said valuation by the commissioners.

As the word "property" is "*nomen generalissimum*" (2 Gray, 35), we cannot meet that presumption unless we are permitted to show that the commissioners did *not* value the contract, and that therefore the term "personal property" in the above statement of valuation did not include the contract.

We submit that the situation is precisely similar to the situation in *Bridge* v. *Gray*, *ubi supra*, where there was a general account which, so far as its terms appear, *might* have embraced the claim which the foreman of the jury and others were permitted to show it did *not* actually embrace.

Wherefore we respectfully submit that it is established under *Bridge* v. *Gray* that the offered testimony of the commissioners is *competent* and admissible.

That conclusion is strengthened by the case of —

Eastman v. *Cooper*, 15 Pick. 276, —

which was tried upon the general issue before SHAW, C. J., ibid. p. 280. In that case the evidence offered was the report of Chief Justice PARKER; and we submit the inference to be deduced from that case is that, where a case is being tried without a jury, the evidence of the officer or officers composing the tribunal is competent and admissible to show that what might, by the terms of the decision, have been included in the judgment was *not* actually included therein.

The same principle is sustained in —

Webster v. *Lee*, 5 Mass. p. *334. (Cited by SHAW, C.J., in *Bridge* v. *Gray*, 14 Pick. at page 60.)

The following is from the headnote: —

"Where parties have submitted all demands to *referees* by a rule entered into before a justice of the peace, and the referees have made their report on all the demands submitted to the Court of Common Pleas, who have rendered judgment thereon, it is still *competent* for one of the parties *to show that a particular demand*, not being in dispute, was *not laid* before the referees, and upon this being proved, an action may be maintained upon such demand."

See the opinion at pages *336, 337.

We submit that *Webster* v. *Lee* is still more closely in point in that the same principles as those which were applied in the case of the foreman of the jury in *Bridge* v. *Gray*, *ubi supra*, and to the memorandum of the chief justice in *Eastman* v. *Cooper*, *ubi supra*, were held to be applicable where the hearing had been conducted by *referees*.

We submit it clearly appears that the evidence offered was offered not in contradiction of the record of the hearing before the commissioners, but simply in explanation of it, and *to rebut the presumption* that the term "personal property" in the commissioners' report included the contract. In short, we submit it is conclusively established by the above authorities that the testimony of the commissioners was and is *competent to show that the contract was not valued in the commissioners' award.*

Second.

THE TESTIMONY OF THE COMMISSIONERS WAS ADMISSIBLE AT THAT STAGE OF THE CASE.

We do not deem it necessary to go over the history of the case for the purpose of showing that the hearing upon which the opinion of August 8, 1900, was rendered was *not a final hearing*. It was specifically limited to hearing a particular constitutional question. (R. 113.)

Moreover, it is important that the court should note that *that precise constitutional question had already been determined by the court in plaintiff's favor* upon the presumption (necessitated by the demurrer upon which the hearing was held) that the alleged compulsion-in-fact existed.

The court had found, in effect, that if the alleged compulsion-in-fact existed, such compulsion-in-fact *constituted also compulsion in law;* that the result of such compulsion was that the sale, though apparently voluntary, was compulsory in law; that such compulsory sale constituted a *taking* by the defendant City; and that, as such taking was without just compensation, it was without due process of law, and was in violation of plaintiff's rights under the Fourteenth Amendment. (See opinion in *Newburyport Water Company* v. *City of Newburyport*, filed February 24, 1898, and reported in 85 Fed. Rep. p. 723. R. 108.)

We respectfully claim and submit that said decision and opinion of February, 1898, constituted not only the law of

this case, but the law of this circuit when we went to the hearing upon the constitutional question, which was decided adversely to plaintiff August 8, 1900.

We ask the court to note especially that, under the decision overruling the demurrer, nothing remained for plaintiff to do but to show the existence of the FACTS alleged in the bill as constituting the compulsion and destroying the voluntary character of the sale.

These alleged facts were established by the stipulation, and were not contradicted. (R. 91, par. 2.)

As the facts constituting what the court had held to be compulsion in law were established in the record without contradiction, we submit that plaintiff was wholly justified in assuming that the prior decision in our favor would be sustained.

Moreover, the defendant, in its petition for rehearing, had claimed as follows: —

> "4. The court assumes in its opinion that the plaintiff's conveyance of its property was involuntary and compulsory, because it is so alleged in the bill. The facts bearing upon this question are fully set out in the bill, and they do not support but are inconsistent with this allegation. The defendant is not concluded by the allegation if the facts set out do not support it or are inconsistent with it. This position is supported by the authorities, many of them binding upon this court, cited on pages 19, 20 and 35 of the defendant's brief, which are not alluded to in the opinion and do not appear to have been considered." (R. 98–99.)

This point was again considered upon briefs of counsel on the petition for rehearing. The opinions of the Circuit Court in both cases show that the matter was presented and determined wholly upon the threat of municipal competition which was set out in the bill. The threat was a matter of record in the statute, and **the only possible fact**

remaining to be proved was that the stockholders were influenced by the threat.

The petition for rehearing was denied. (R. 101.)

[That the final decision of the Circuit Court against us was not caused by any failure to establish by evidence the allegations of the bill is further supported by the fact that the Circuit Court sustained the *demurrer* in the Gloucester case.] (Gl. R. 89.)

We submit, then, that plaintiff was not only justified in assuming at the argument upon the constitutional question that the prior decision in our favor would be sustained, but was also justified in not adding to the length and difficulties of the case by attempting to bring any additional points before the court either for the purpose of influencing its opinion in relation to the alleged violation of the Fourteenth Amendment, or for the purpose of establishing plaintiff's claim that the legislation complained of impaired the obligation of plaintiff's contracts.

In short, we submit that, in principle, plaintiff's position is like the position of the plaintiff in the case of —

Loring v. *Salisbury Mills*, 125 Mass. 138.

That case was an action of *tort* for an illegal issuing of certificates of stock by the defendant corporation.

The full bench of the Massachusetts Supreme Court held that an action of tort could not be maintained, because the plaintiff's title to the stock was an equitable and not a legal title; and ordered "*judgment for the defendant.*"

Ibid. p. 141.

We beg to quote what follows: —

"GRAY, C.J.: The plaintiff was evidently *misled* by the suggestion, in the rescript in *Salisbury Mills* v. *Townsend*, 109 Mass. 115, that his remedy was *at law*. By virtue of the terms of the original indenture,

and of the power of appointment executed in accordance therewith, he has clearly become, *in equity*, the assignee of any rights of action for injuries to the trust property before his appointment. *Justice therefore requires* that he should have the *opportunity* of trying the question whether he can maintain his claim in equity against the defendant.

Amendment allowed."

Ibid. p. 142.

The plaintiff in *Loring* v. *Salisbury Mills* was one of the parties to the action in —

Salisbury Mills v. *Townsend et al.*, 109 Mass. 115.

In reliance upon the decision in 109 Mass. he brought his action in tort.

Note that in that action the full court actually ordered *judgment for the defendant;* yet, because the plaintiff was *misled* by the decision in 109 Mass., the plaintiff was allowed to amend his case from an action at law by filing a bill in equity.

125 Mass. 142.

The suit in equity was thereupon tried, and the plaintiff was finally successful therein.

We respectfully submit that we were misled, by the prior decision in our favor, in thinking that this court would not overrule its decision in our favor upon defendant's demurrer. We submit that, even if the court had sent down a decree in defendant's favor dismissing the bill, yet, to paraphrase the opinion of GRAY, C.J., above quoted, — 125 Mass. p. 142, — *justice would require* that plaintiff should have the opportunity of trying the question whether it can maintain its claim against the defendant *in any other way consistent with its present bill.*

In the present case, however, we submit that the Circuit Court did not have to go so far as did the Massachusetts court. There had been no appeal; there had not even been a final hearing; there had been only a special hearing upon a single question; and, in view of the difficulties and importance of the case, we submit that, even had we not been misled by the previous decision, justice and equity required that we should have a full opportunity to present any additional aspects of the case other than the one determined against us August 8, 1900. (R. 113.)

Moreover, we respectfully claim, as matter of right, that we should have been permitted, and should be permitted, under all the circumstances, to make a full presentation of our claim relating to the obligation of contracts, and that the evidence offered in said stipulation is necessary to sustain such claim.

Third.

THE EVIDENCE OFFERED BY PLAINTIFF UNDER THE NEW STIPULATION IS MATERIAL.

The evidence was offered to show that the Water Company's contract with the City for water for fire purposes was not included in the valuation made by the commissioners, and therefore is not to be paid for under the act of 1894.

Any legal contract, exclusive or non-exclusive, is within the protection of the constitutional provision prohibiting the impairment of the obligation of contracts; but every contract may nevertheless be constitutionally destroyed by the state, provided there be just compensation for such property like any other property taken. *The provision for payment turns the whole transaction from an impairment of the obligation of the contract into a full recognition of that obligation by providing just compensation therefor.*

See *Long Island Water Supply Co.* v. *Brooklyn*, 166 U.S. 685, at pages 689–693, and numerous cases there cited.

It is clear, therefore, that just compensation for the contract would save the defendant in this case and the state from any possible charge of impairment of the obligation of the contract, just as compensation for the contract enabled the city of Brooklyn to preserve itself from liability in the above Long Island Water Company case. For it is to be noted that in that case "the commissioners valued first the tangible property at $370,000, and the franchises, contracts, and all other rights and property, *including this particular contract* [that is, the contract for hydrant rentals] at $200,000."

166 U.S. at page 691.

Wherefore we claim and submit that evidence that the contract was not included in the commissioners' valuation was and is MATERIAL.

Plaintiff's reply to certain cases cited by defendant to the Circuit Court against the admissibility of said testimony.

Defendant's said cases were all Massachusetts citations except two, one of which is a United States Circuit Court case, 28 Fed. Rep. 403, and the other a decision of the House of Lords, L.R. 5 H.L. 418.

These cases may be most conveniently met and explained by presenting at the outset the following extract from the opinion in —

Evans v. *Clapp*, 123 Mass. 165, —

in which case three of the defendant's cases are cited.

These three cases are —

Ward v. *Gould*, 5 Pick. 291, cited 123 Mass. at page 170;

Withington v. *Warren*, 10 Met. 431, cited 123 Mass. at page 170; and —

Buccleugh v. *Metropolitan Board of Works*, L.R. 5 H.L. 418, 451, 462, cited 123 Mass. at page 170.

We submit the following from the opinion in —

Evans v. *Clapp*, 123 Mass., at pages 169, 170:

"It often becomes necessary, in determining *what questions are concluded by the award*, or whether the award is in itself binding upon the parties, to show by parol evidence what took place before the referee, what was in controversy before him, and *what matters entered into his decision*. *The referee is a competent witness himself to establish these facts*. *Martin* v. *Thornton*, 4 Esp. 180. *Strong* v. *Strong*, 9 Cush. 560, 576, and cases cited. *Blakely* v. *Graham*, 111 Mass. 8. *Scott* v. *Perley*, 98 Mass. 511. *Wood* v. *Willis*, 110 Mass. 454. *In Re Dare Valley Railway*, L.R. 6 Eq. 429, 435. But parol evidence is *not* admissible to *vary* or *control* a written award, and there are numerous decisions showing in what cases such evidence is incompetent, and in which a referee is precluded from testifying. *Wiswall* v. *Hall*, Quincy, 27. *Withington* v. *Warren*, 10 Met. 431, 433. *Clark* v. *Burt*, 4 Cush. 396, 399. *Leavitt* v. *Comer*, 5 Cush. 129. *Ward* v. *Gould*, 5 Pick. 291. See 2 Greenl. Ev. § 78."

At page 173: "We therefore decide that the award was competent, and that *it was also competent to show* that the question whether the firm or the company owned the rubber goods was in *controversy* before the referee, and that he *decided* that a *certain number of them* belonged to the firm."

The defendant's latest Massachusetts citation is —

Packard v. *Reynolds*, 100 Mass. 153.

The decision which we cite and quote above is a still later Massachusetts case, 123 Mass., and, if in conflict with the other cases, controls them. Under *Evans* v. *Clapp*, above quoted, it is clear plaintiff does not need to attempt to come in under any *exception* to the general rule. In short, as shown in the above quotation, there are *two rules*, and we claim the benefit of the *first*, which is as follows: —

> "It often becomes necessary, *in determining what questions are concluded by the award*, or whether the award is in itself binding upon the parties, to show by parol evidence what took place before the referee, what was in controversy before him, and *what matters entered into his decision. The referee is a competent witness himself to establish these facts.*"
>
> 123 Mass. 169.

The second rule is there stated as follows: —

> "But parol evidence is *not* admissible to *vary* or *control* a written award, and there are numerous decisions showing in what cases such evidence is incompetent, and in which a referee is precluded from testifying."
>
> 123 Mass. 169, 170.

We do not seek to "vary or control" the written award. The award was a definite sum of money, $275,000 and interest. (R. 11.)

Examining now defendant's citations *seriatim*, we show, —

1. *Legg* v. *Legg*, 8 Mass. 99:

We submit this case is too remote. It is a question of parol evidence respecting the grounds of the judgment of

the court in awarding alimony. The entire opinion is less than four lines, and no citation is given.

2. *Ward* v. *Gould*, 5 Pick. 291:

Opinion is *per curiam*, only six lines. No authorities are stated. This case is cited in —

Evans v. *Clapp*, 123 Mass. at page 170, in the following connection: —

At page 169: "The referee is a competent witness himself to establish *these facts*. *Martin* v. *Thornton*, 4 Esp. 180. *Strong* v. *Strong*, 9 Cush. 560, 576, and cases cited. *Blakely* v. *Graham*, 111 Mass. 8. *Scott* v. *Perley*, 98 Mass. 511. *Wood* v. *Willis*, 110 Mass. 454. *In re Dare Valley Railway*, L.R. 6 Eq. *170 429, 435. But parol evidence *is not admissible to *vary* or *control* a written award, and there are numerous decisions showing in what cases such evidence is incompetent, and in which a referee is precluded from testifying. *Wiswall* v. *Hall*, Quincy, 27. *Withington* v. *Warren*, 10 Met. 431, 433. *Clark* v. *Burt*, 4 Cush. 396, 399. *Leavitt* v. *Comer*, 5 Cush. 129. *Ward* v. *Gould*, 5 Pick. 291. See 2 Greenl. Ev. § 78."

3. *Gay* v. *Welles*, 7 Pick. 217:

This was a jury case where the evidence offered was "inconsistent with the record," and its exclusion was approved by the full court because the evidence offered "*contradicts the record*" (p. 219).

Note that even in the above case the court pointed out an additional remedy.

This case seems never to have been cited by the court.

4. *Withington* v. *Warren*, 10 Met. 434:

This was a case where the parol evidence was offered to *contradict* the award. As shown above, it is one of the

cases cited in *Evans* v. *Clapp*, 123 Mass. at page 170, to show that a referee's testimony is not admissible to carry or control a written award. But it leaves untouched the earlier rule stated at 123 Mass. 169, and under which we claim that we have a right to use such evidence to show what matters entered into the referee's decision, or, as part of the same rule, what matter was excluded from the referee's decision.

5. *Chappell* v. *Hunt*, 8 Gray, 427:

This is a case of a levy of execution and the identity of land; and we submit that upon inspection it has nothing to do with the present case.

6. *Sparhawk* v. *Twitchell*, 1 Allen, 450:

In that case it was sought to *impeach* a final decree of a court of equity and to control it "by statements contained in the master's report." (Ibid. p. 451.) The master's report had been merely "received in evidence" in the course of the original hearing, and presumably other evidence was also given. The court held that the decree could not be impeached by the master's report. We submit that that case is too remote to be an authority one way or the other upon the present case, and that it leaves the present case to be decided upon the authorities which are directly applicable.

7. *Monk* v. *Beal*, 2 Allen, 585:

The opinion shows that the testimony of an auditor was offered to *impeach* his report.

As we do not seek to impeach the award in the present case we submit that *Monk* v. *Beal* is not authority against us.

8. *Packard* v. *Reynolds*, 100 Mass. 153:

This is the latest and last Massachusetts case cited by the defendant against us.

It is another case of an attempt to *contradict* an auditor's report by the testimony of the auditor.

The entire opinion upon this part of the case is as follows: —

> "The report having been read in evidence, the defendant had no right to call the auditor to *contradict* it. *Monk* v. *Beal*, 2 Allen, 585." (100 Mass. 155.)

9. *Alexander* v. *McNear*, 28 Fed. Rep. 403:

The headnote is as follows: —

> "1. *Arbitration — Enforcing Awards — Degree of Certainty Required — Judgment.*
>
> "Judgment cannot be rendered on an award which does not fix with certainty the amount to be paid, or give precise *data* from which the amount can be ascertained.
>
> "2. *Same — Arbitrators — Uncertainty in Award — Evidence.*
>
> "Arbitrators cannot be called upon for the purpose of explaining anything *vague* and *uncertain* in their award."

We submit that the inapplicability of that case to the present is obvious. The award in the Alexander case was uncertain and vague, and the court therefore refused to confirm it.

In the present case the award is clear and specific, being for $275,000 and interest. (R. 13.)

The Alexander case is therefore not an authority against our contention that we have a right to show by the testimony of the commissioners that they did not include the value of the contract in their clear and specific award of $275,000 and interest.

The last case cited by defendant is —

10. *Buccleugh* v. *Metropolitan Board of Works*, L.R. 5 H.L. 418, 457, 462:

The case itself is long and complicated, and contains numerous opinions, a quotation from one of which appears in the opinion in *Evans* v. *Clapp*, 123 Mass. at pages 170, 171.

We submit that a careful examination of the Buccleugh case, and of its use by the Massachusetts Supreme Court in 123 Mass., at page 170, will show that it is authority *for* the plaintiff's contention instead of against it.

Other cases cited in and citing the above cases:

Ziegler v. *Ziegler*, 2 S. & R. 286, cited 123 Mass. at page 171:

From headnote: "Where an award of arbitrators is in issue, the arbitrators may be examined to prove *what* they decided upon."

Ziegler v. *Ziegler* is confirmed in —

Coleman's Appeal, 62 Pa. St. at page 273, —

from which we quote as follows: —

"It is established by a number of cases in this court that parol evidence may be given to *explain* and *limit* the effect of a judgment *wherever it is not inconsistent with the record.*"

The court here cites the Ziegler case and other cases. The Ziegler case is also cited with approval in —

Follansbee v. *Walker*, 74 Pa. St. at page 310.
In re Dare Valley Railway Co., L.R. 6 Eq. 429, 435.

That case is cited (as we claim, in our favor) in 123 Mass., at page 171; also in the Buccleugh case, L.R. 5 H.L. at page 428.

The headnote is as follows: —

"The court will admit evidence of an arbitrator in explanation of his award; and when it appears from

such evidence that there has been a mistake on his part, either as to the subject-matter referred to him, or in point of legal principle affecting the basis on which the award is made, the award will be set aside or referred back again to the arbitrator."

Wherefore we submit that where the award itself is definite and is not in question, and it is not sought to impeach or control it, the testimony of the referees or commissioners is admissible to "explain it," or to show that it did not include the contract.

We are not here seeking to vary, control, impeach, or contradict the commissioners' finding that the contract was not valued, or their ruling that "the same in law could not be valued." On the contrary, we submit that as the whole award was approved by the Supreme Court of Massachusetts, *that ruling stands as showing how the statute of 1894 was construed and applied.*

Our grievance is against the state of Massachusetts for having passed a law which, as construed and applied, impaired the obligation of this contract. *If we were compensated for the contract, then, under the decisions cited in our brief, our grievance as to the contract would disappear.*

Defendant's counsel, having succeeded in getting a construction of the statute which excluded the contract from valuation, and having succeeded in causing the value of the contract to be excluded from the award, now comes forward with the inequitable claim that we shall not be permitted to show that the contract was not valued, but that the present court of equity is bound to treat the case as if the contract had been valued, although through defendant's action the same was excluded from valuation! We submit it needs no argument to show that such inequitable claim should not be allowed. Moreover, we submit that the case is clearly within the opinion in *Dare Valley*

Railway Co., L.R. 6 Eq. 429, 435, above cited and quoted (*ante*, p. 164).

Note, *ubi supra*, that the Dare Valley case was relied upon both by the Massachusetts Supreme Court and also by the House of Lords, and that in it the court admitted evidence of the arbitrator to explain the award, and thus permitted it to be shown *what was the legal basis of the award*.

As sustaining our present contention, see also —

Strong v. *Strong*, 9 Cush. 569.

This is one of the cases citing —

Withington v. *Warren*, 10 Met. 434, —

cited in defendant's brief, at page 2.

In *Strong* v. *Strong* there was another attempt to *impeach* an award. That case shows that under certain circumstances an arbitrator may even testify to facts which would show the award to be void for illegal cause.

In short, we submit the authorities are clear that, as the tribunal found *as matter of law*, that the contract was not to be valued, and therefore did not value it, we are entitled to show by the commissioners that the contract was *not* included in the valuation stated in the award.

We submit that this position is confirmed by the cases cited above by plaintiff, and also by the opinion in —

Hale v. *Huse*, 10 Gray, 102.

In that case the objections to the testimony were largely the same as the objections here. They are stated as follows: —

> "The defendant objected 'that the action could not be maintained on the ground that this was an attempt to *impeach* collaterally the award of the referees;

that no action lies to recover money paid on a judgment of court still unreversed; that the judgment upon Brown's petition could not affect this defendant, being *res inter alias;* that as Hale paid the money on Brown's decree of sale before he satisfied the defendant's execution, he did not pay it to the defendant's use; that the plaintiff's proper remedy, if he has any, *was to review or reverse the judgment upon the award;* and that he had not called all the referees, but had undertaken to show the judgment of all by the testimony of but two.' But the court refused so to rule." (10 Gray, 101.)

While there were other points in the case, the matter of the evidence of the arbitrators was treated independently by the court and disposed of summarily as follows: —

"THE EVIDENCE OF THE ARBITRATORS WAS NOT OFFERED TO IMPEACH THEIR AWARD, BUT TO SHOW THAT THIS CLAIM WAS NOT INCLUDED IN IT; AND FOR THIS PURPOSE WAS CLEARLY ADMISSIBLE." (10 Gray, 102.)

Similarly, we ask the court here to find that, notwithstanding any claim or suggestion that the evidence which we offer is offered to impeach the award, such evidence is "*not* offered to impeach their award," but to show that the contract was "*not included in it.*" (Ibid. page 102.) And finally we ask the court to hold, as above ruled, that the evidence offered "for this purpose was clearly admissible." (Ibid. page 102.)

Wherefore we claim and submit that the error specified in the eighth assignment of error (concerning the exclusion of testimony) has been established. (See assignment of error VIII., R. 133; also *ante*, p. 18.)

Argument upon the Merits.

I.

PLAINTIFF AND DEFENDANT MADE, UNDER THE AUTHORITY OF THE STATE, AN EXCLUSIVE CONTRACT FOR THE CITY'S WATER SUPPLY FOR FIRE PURPOSES DURING THE CONTINUANCE OF THE CONTRACT, AND NOT EXCEEDING TWENTY YEARS. AND WHEN THE STATUTES OF 1893 AND 1894 WERE ENACTED, THE CONTRACT HAD SEVERAL YEARS YET TO RUN.

The act of 1880, incorporating the plaintiff Company authorized the City of Newburyport to contract with the Newburyport Water Company for a supply of water for fire purposes for a term of years. (Acts of 1880, c. 235, section 8. R. 20. See Appendix, *post.*)

In accordance with these provisions a contract between the plaintiff and defendant was duly made, and was to run for twenty years from October 1, 1881, unless the City should purchase the property in accordance with section 11 of the act of 1880. (See allegations in paragraph 4 of Bill, R. 2, 3.)

As the answer admits the making of the contract, and the establishment of the system under it, it is not necessary to show that all the preliminary steps were taken which were necessary to make the contract binding. (Answer, par. 4, R. 60.)

> *Knox County* v. *Ninth Nat. Bank*, 147 U.S. at page 98:
>
> "But further, the validity of the bonds *is admitted by the answer, and, therefore, it is unnecessary to prove every separate step which otherwise might be required in order to show the legality of this issue.*"

Under this contract the Water Company agrees, *inter alia*, —

"that it will furnish said city water as hereinafter provided, *unless sooner terminated by the purchase of its property by said party of the second part in accordance with Section 11 of Chapter 235 of the Acts of 1880*," and "that it will at all times maintain a *head of water* NOT LESS than one hundred and twenty-five feet above tide water, and will *furnish* and maintain a FULL *supply of water for fire purposes during the existence of this contract*."

And in consideration of the above the City agrees to pay therefor $6000 "in cash and every year during the existence of this contract." (R. 27.)

A. *This contract for a full supply of water for fire purposes was expressly exclusive; because it provided that the Company should at all times during the term of the contract furnish "a* FULL *supply of water for fire purposes."*

1. It is true that the word "exclusive" is not used, but we submit that that word is not the only term by which the exclusiveness of a contract can be expressed; and that if the right in question under the contract is *clearly made known* or *distinctly indicated* by written words therein, the contract or agreement is *express* with reference to such right.

The verb "express" is defined in the Century Dictionary as follows: —

> . . . "3. To manifest or exhibit by speech, appearance or action; *make known* in any way, but especially by *spoken or written words*."

While the adjective is defined thus:

> "I. *a. 1. Clearly made known; distinctly* expressed or *indicated; unambiguous;* explicit; direct; plain."

2. Under the above definitions *it is clearly made known and distinctly indicated* by written words in the contract that it is intended *that plaintiff alone should furnish water for fire purposes* to defendant during the continuance of the contract.

Note that the language is "full supply of water for fire purposes."

We submit that these words mean *just what they say;* that they are plain, and need no interpretation.

Ruggles v. *Illinois*, 108 U.S. 526, at page 534.

We submit that "full supply" is the equivalent of *entire* supply, — *complete* supply, — *all* the supply *which the City needs and is to use*, — all of course for the limited purpose, to wit, for *fire purposes*.

That this language is exclusive, and obliges the City to procure all its water for fire purposes from the defendant Company, see —

Smith v. *Morse*, 20 La. Ann. 220.
National Furnace Co. v. *Keystone Mfg. Co.*, 110 Ill. 427.

It may be claimed by the defendant that, as the number of hydrants was limited in the contract, this limitation controlled the term "a full supply of water for fire purposes," and prevents the construction that the contract was for the City's entire supply of water for fire purposes during the existence of the contract.

If this claim be made, we answer as follows: —

First. The presumption is that the words "*full* supply" mean just what they say.

Ruggles v. *Illinois*, 108 U.S. p. 534, cited above.

And if defendant claims that a full supply cannot be furnished by and through the number of hydrants provided in the contract, it is for defendant to establish that fact.

Second. It is not shown, nor is it even claimed, that the plaintiff Company ever failed to furnish the full, the entire, supply of water for fire purposes.

Third. The stipulation filed June 10, 1899, provided, *inter alia*, as follows: —

> "This stipulation . . . is not intended to exclude any matters of which the Court may take *judicial notice*." (R. 91.)

Judicial notice extends to matters of science involved in the case, and if the judge's memory is at fault he may refresh it by resorting to any means for that purpose which he may deem safe and proper.

And where the court may take judicial notice, no pleadings or proofs of the matter which is subject to judicial notice need be made or offered.

> *Brown* v. *Piper*, 91 U.S. at pages 42, 43.
> *Specialty Mfg. Co.* v. *Fenton Mfg. Co.*, 174 U.S. at page 497.
> *Walla Walla* v. *Walla Walla Water Co.*, 172 U.S. 1, at page 11.

Fourth. By the application, under the law of judicial notice, of well-known hydraulic or hydrodynamic principles to the terms of the contract, it will be seen that the supply of water is not limited by the limitation as to the number of hydrants, but that the Water Company is bound, under the contract, to furnish to the City a full, unlimited supply of water for fire purposes. It is to be noted that the contract, after providing for the number of hydrants, continues: "That it [the Water Company] will at all times maintain a *head of water* NOT LESS than 125 feet above *tide water*, and will furnish and maintain a full supply of water

for fire purposes during the existence of this contract." (R. 27.)

The meaning of the term "head of water" is thus explained in Webster's Dictionary under "Head":

> "*Head* . . . 8. The source, fountain, spring, or beginning, as of a stream or river; as, the *head* of the Nile; hence, the *altitude of the source*, or *the height of the surface, as of water, above a given place*, as above an orifice at which *it issues*, and *the pressure resulting from the height or from motion*."

Under the above definition it appears that the Company agreed to maintain in its reservoir or standpipe a column of water, the height of which should be *not less* than 125 feet above tide water.

The above definition also states the well-known and obvious fact that the pressure of the column of water depends upon its height; and we have no doubt that the court knows, and will take judicial notice of the fact, that the amount of water furnishable through the hydrant is governed and limited only by the pressure with which the water is forced through the hydrant.

When, therefore, the parties provided in the contract for a *full supply of* water for fire purposes, and in connection with that provided that the "head of water" should be maintained at *not less* than 125 feet above tide water, and *there was no limitation as to how much higher the head of water should be*, we submit that the obvious and necessary construction of the contract is that a full supply of water must be furnished from the hydrants; and if a head of water 125 feet was not sufficiently high, the Company must make the standpipe enough higher to furnish a "FULL *supply* of water for fire purposes."

Wherefore we submit it remains that it is established that the contract for a FULL *supply of water for fire purposes was expressly exclusive.*

B. *The exclusiveness of the contract, during its limited term, was an incident of the statutory power to make the contract; because —*

1. *The exclusiveness would not lead to a monopoly as against the City; because —*

(*a*) *The term of the contract was limited.*

The Company's right and duty to furnish this full supply of water for fire purposes was to continue for twenty years "unless sooner terminated by the purchase of its [the Company's] property by said party of the second part in accordance with section 11 of chapter 235 of the acts of 1880." (R. 26, 27.)

(*b*) The City had "the right at any time after ten years from the date of the completion of said works to purchase the corporate property and all the rights and privileges of said company." (Acts of 1880, c. 235, sec. 11. R. 21. Appendix, *post*.)

In —

Walla Walla City v. *Walla Walla Water Co.*, 172 U.S. 1, at pages 17, 18, —

the court said, —

> (From Opinion:) "6. Nor do we think the contract objectionable in its stipulation that *the city would not erect water works of its own during the life of the contract*. There was no attempt made to create a monopoly by granting an exclusive right to this company, and the agreement that the city would not erect water works of its own was accompanied, in section 8 of the contract, with a reservation of a right to take, condemn and pay for the water works of the company at any time during the existence of the contract. *Taking sections 7 and 8 together, they amount simply to this:* That if the city should desire to establish water works of its own it would do so by condemning the

property of the company and making such changes in its plant or such additions thereto as it might deem desirable for the better supply of its inhabitants; but that it would not enter into a direct competition with the company *during the life of the contract. As such competition would be almost necessarily ruinous to the company, it was little more than an agreement that the city would carry out the contract in good faith.*

"*An agreement of this kind was a natural incident to the main purpose of the contract, to the power given to the city by its charter to provide a sufficient supply of water, and to grant the right to use the streets of the city for the purpose of laying water pipes to any persons or association of persons for a term not exceeding twenty-five years.* In establishing a system of water works *the company would necessarily incur a large expense* in the construction of the power house and the laying of its pipes through the streets, and, *as the life of the contract was limited to twenty-five years, it would naturally desire to protect itself from competition as far as possible, and would have a right to expect that at least the city would not itself enter into such competition.* It is not to be supposed that the company would have entered upon this large undertaking in view of the possibility that, in one of the sudden changes of public opinion to which all municipalities are more or less subject, the city might resolve to enter the field itself — *a field in which it undoubtedly would have become the master* — and *practically extinguish the rights it had already granted to the company.* We think a disclaimer of this kind was within the FAIR INTENDMENT of the contract, and that *a stipulation to that effect was such a one as the city might lawfully make as an incident of the principal undertaking.*

"Cases are not infrequent where under a general power to cause the streets of a city to be lighted, or to

furnish its inhabitants with a supply of water, *without limitation as to time*, it has been held that the city has no right to grant an exclusive franchise for a period of years; but these cases do not touch upon the question how far *the city, in the exercise of an undoubted power to make a particular contract, can hedge it about with limitations designed to do little more than bind the city to carry out the contract in good faith, and with decent regard for the rights of the other party.*"

That is, the limited exclusiveness was upheld because the state's right to buy prevented the monopoly as against the City, which is the ground upon which the alleged exclusiveness of municipal contracts is forbidden, where it would be upheld in contracts between private persons or private corporations.

And this rule is upheld in —

Citizens St. Ry. Co. v. *Detroit Ry.*, 171 U.S. at page 54, citing —
Grand Rapid &c. Power Co. v. *Grand Rapid &c. Co.*, 33 Fed. Rep. 659.

It may be claimed by the defendant that, as the City of Newburyport did not have the right to purchase the Company's property during the first ten years of the contract, the contract as to exclusiveness was void. It is to be observed, however, that the legislation complained of, and the acts of the parties complained of, did not occur within such first ten years, and that, at the times of all the transactions complained of, the City had the full right to purchase all the Company's property (just as in the Walla Walla case) merely upon paying just compensation therefor.

Wherefore we submit it remains that the case here presented falls wholly within the principles of law established in the Walla Walla case, *ubi supra*.

2. *The power to make such exclusive contract was given to the parties by the act of 1880.*

If it be contended that the City had no power to make such an exclusive contract, the answer is clearly and decisively furnished by the terms of the act of incorporation, and by the Walla Walla case, *ubi supra*.

The act of incorporation, as already shown, expressly provided as follows: —

> "The city of Newburyport is hereby authorized to contract for a *supply of water for fire purposes for a term of years with said Newburyport Water Company; provided*, the same is assented to by said city by a majority vote of the voters present and voting thereon at a legal meeting called for that purpose."
>
> Section 8 of chapter 235, acts of 1880. (R. 20, 21. Appendix, *post*.)

It is true that that act does not define the term of years, and that it only says "a supply of water for fire purposes," while the contract adds the word "*full*," — a "*full* supply of water for fire purposes." (R. 27.)

Under the decision in the Walla Walla case we submit that both the terms of the contract, to wit, (1) its duration for twenty years, and (2) that the supply shall be a full supply of water for fire purposes, are upheld as an "*incident of the contract*" authorized by the statute.

172 U.S. at pages 17, 18, *ubi supra*.
See also *Los Angeles* v. *Los Angeles City Water Co.*, 177 U.S. 558, at pages 570, 571.

Wherefore we submit it is established that the contract for a full supply of water for fire purposes was expressly exclusive, and that such exclusive contract was authorized by the act of 1880, incorporating the plaintiff Company.

Among the many cases which we have examined holding that municipal contracts cannot be held to be valid, exclusive contracts, we have not found one which in fact and in principle contradicts our claim. In many of the cases the courts have refused to uphold the contract, not because it was not expressly exclusive, but *because the City was utterly without power to make any such contract.* Some of these decisions are cited by the court in the Walla Walla case next following the quotation therefrom given above (*ante*, p. 173).

Such decisions did not, however, prevent the Supreme Court from upholding the exclusiveness of the contract in the Walla Walla case; and we submit that they should not prevent this court from upholding the exclusiveness of the contract in the present case, — an exclusiveness authorized and upheld as a mere "*incident*" to the contract authorized by the statute, and constituting only a limitation "designed to do little more than *bind the City to carry out the contract in good faith, and with decent regard for the rights of the other party.*"

172 U.S. at page 18.

Examination of United States Supreme Court cases cited for defendant (in an earlier brief) upon the question of the exclusiveness of the contract for water for fire purposes.

If, however, the defendant should seek, notwithstanding the unambiguous terms of the contract, to claim that it was not exclusive, we beg the court to examine carefully and critically the terms of each and every contract in every case, if any, which may be cited by the defendant [or by the court] to show that our contract is not in terms exclusive.

Among the many superficially similar cases which we have examined, we have not found one case where the contract was held not to be exclusive, and where the terms

were like the terms upon which we claim our contract to be exclusive to the extent of furnishing water for fire purposes. In fact, in many of the cases the ground of the decision cited against us as showing the contract to be non-exclusive is seen, when examined closely, to be something clearly distinguishable from the present case.

We have examined the United States Supreme Court cases cited in respondent's brief in the Circuit Court, upon the constitutional question under his heading and claim that "The Plaintiff had No Exclusive Rights Under Any Implied or Resulting Contract With The City."

The first is —

> *Spring Valley Water Works* v. *Schottler*, 110 U.S. 547 (should be 347).

The remoteness of that case from the point to which respondent's counsel cited it, is best shown by the following extract from the opinion: —

> (At page 351:) "The general question involved in this case is whether water companies in California, formed under the act of 1858 before the adoption of the Constitution of 1879, have a right, which the State is prohibited by the Constitution of the United States from impairing or taking away, to charge their customers such prices for water as may from time to time be fixed by a commission made up of two persons selected by the company, two by the public authorities of the locality, and, if need be, a fifth selected by the other four, or by the sheriff of the county. The Spring Valley Company claims no rights of this character that may not also be claimed by every other company formed under the same act."

The next case cited by respondent is —

> *Lehigh Water Co.* v. *Easton*, 121 U.S. 388.

As that case was also cited by the court against us (R. 118), it deserves careful consideration.

The ground of the decision in the Lehigh case was *not* that the contract was not in terms exclusive, but the fact that the law, which was alleged as impairing the obligation of the Lehigh Water Company's contract, was a law which existed *before* the enactment of the law under which exclusive rights were claimed: to wit, the alleged impairment was under the act of 1867, while the rights involved were conferred by the act of 1874, and the court said, —

> "Had the borough of Easton been authorized by a statute enacted *after** the Lehigh Water Company had acquired the exclusive privilege given by the act of 1874, then this court would have been compelled to decide, upon its independent judgment, whether the latter applied only to private corporations."
>
> Ibid. at pages 391, 392.

Respondent's next case is —

> *Sioux City St. Ry. Co.* v. *Sioux City*, 138 U. S. 98, 107.

Turning to page 107, as indicated in respondent's brief, we find there that the question involved was not whether, as a matter of construction, the contract was exclusive, but whether the City had *power* to make the contract. The language of the court there is as follows: —

> "*It was not in the power* of the city, by any contract with the company, to deprive the legislature of the power of taxing the company."
>
> Ibid. p. 107.

We have shown, *per contra*, that under St. 1880, and the decision in the Walla Walla case, the City of New-

* The italics are by the court.

buryport had the power to make the contract exclusive for the term of twenty years.

Respondent's next case is —

> *Long Island Water Co.* v. *Brooklyn*, 166 U.S. 685, 696.

We presume that the citation of page 696 refers to the brief sentence "the contract in terms contains no words of exclusion."

The contract itself is not set out. There is nothing on page 696 to show what its terms were, and we have been unable to find that the contract is copied or quoted from anywhere in the United States report. On page 686 we find the following in the headnote: —

> "An existing system of water supply in a municipality which is the property of private individuals and is operated under a contract with the municipal corporation for furnishing it with a *portion of its needed supply of water under rates fixed by the* contract, is private property which may be acquired by the public, in the exercise of the power of eminent domain, *on the payment of a just compensation*, including compensation for *the termination of the contract*."
>
> Ibid. p. 686.

We submit that there is nothing in said case tending to show that the Newburyport Water Company's contract with the City was not exclusive to the extent hereinbefore claimed and shown.

On the other hand, as we show later, the case is authority for our contention that the state cannot constitutionally deprive plaintiff even of its property without providing just compensation not only for the tangible property, but also for said contract; and this whether the contract be exclusive or not.

The last United States Supreme Court case cited by defendant's counsel in the Circuit Court under the heading "The plaintiff had no exclusive rights under any implied or resulting contract with the City" is —

Citizens St. Ry. v. *Detroit Ry.*, 171 U.S. 48, 53.

There the question is not at all one of construction of the contract; but, like all other cases already alluded to, was a question of *power*.

> "At the time when the plaintiff in error received from the city of Detroit exclusive authority to construct and operate its railways in that city, the common council of Detroit *had no power* either inherent or derived from the legislature, to confer an exclusive privilege thereto."
>
> Headnote, 171 U.S. 48.

The opinion shows it was *not the contract* (which was in the form of an ordinance), *but the statute behind the contract*, which was the subject of construction, and the court said, at the page cited by respondent's counsel, —

> "It is clear that the *statute* did not explicitly and directly confer the *power* on the municipality to *grant* an exclusive privilege to occupy its streets for railway purposes. It is urged, however, that such power is to be *inferred* from the provision which requires the consent of the municipal authorities to the construction of a railway under such terms as they may prescribe, combined with the provisions of the constitution." . . . (Ibid. p. 53.)

We do not seek to deny or evade the force of that decision. We beg to point out, however, that it is reported one volume earlier than the Walla Walla case, 172 U.S. 1,

and was undoubtedly familiar to the court when the Walla Walla decision was rendered.

Except for the fact that our act of incorporation authorized the City of Newburyport to contract with the Water Company for a supply of water for a term of years, we probably should not have been able to contend successfully that we had an exclusive contract for a supply of water for fire purposes, but we submit that under the Walla Walla decision, as already shown, our act of incorporation conferred the power to make the contract just as it was made, namely, an exclusive contract for a limited term of years, and containing a provision that the City might buy out the Company; such exclusiveness being, as held in the Walla Walla case, a mere "*incident*" of the authorized contract, and "designed to do little more than bind the city to carry out the contract in good faith, and with decent regard for the rights of the other party."

172 U.S. p. 18.

It may be useful to point out here certain features of these additional United States Supreme Court cases which THE CIRCUIT COURT *relied upon principally in its said opinion of August 8, 1900, upon the question of exclusiveness.*

It should specially be noticed, however, that the court was *not considering the contract*, but was considering the exclusiveness of the Company's general franchises. (R. 116–120.)

The Circuit Court cited (R. 117, 119):

Hamilton Gas Light Co. v. *City of Hamilton*, 37 Fed. Rep. 832; (s.c.) 146 U.S. p. 258.

We submit that that case is clearly distinguished from the present one by the fact that the contracts to furnish the City with gas had *absolutely expired before the passage of*

the ordinance which, it was claimed, impaired the obligation of contract.

See 146 U.S. at pages 261, 262.

In that case the plaintiff Company was given the exclusive right to furnish water from a certain source, but this supply proved inadequate to supply the needs of the people, and the legislature, expressly noting this inadequacy, gave to a new company (defendant) the right to also furnish water.

In view of these facts, the court, while maintaining the exclusiveness of the right in the plaintiff Company to supply water from the particular source, held that the community could be supplied *not by the City, but by another company* FROM ANOTHER SOURCE, — the object being obviously to obtain from all sources that adequate supply which was not furnished by the plaintiff in that case.

In the Walla Walla case insufficiency of the supply was set up in the pleadings, —

172 U.S. at page 18, —

and apparently was fully argued.

Ibid. p. 22.

But the court held that the Company was entitled to its full contract rights, as expressed in the contract itself. At the close of the opinion the court said as follows: —

> "Whether *if a sudden emergency arose*, requiring immediate action on the part of the city to procure a further supply, or to preserve the health of its inhabitants, a preliminary avoidance of the contract would be necessary, is a question not involved in this case, and upon which we express no opinion."

Ibid. p. 23.

Possibly, in case of any such emergency, the court might hold that the police power would give the right to avoid the contract.

Ibid. pp. 15–17.

But in the present case the record contains no suggestion whatever that the Company had not furnished, or could not furnish, a *full* supply of water for *fire purposes*.

Wherefore we submit it remains, as already established, that the Company's contract was exclusive as against the City, at least to the extent of conferring upon the Company the sole right to furnish the City with water for fire purposes during the existence of the contract.

The court next cites again *Hamilton Gas Co.* v. *Hamilton*, which we discussed under its earlier citations (*ante*, p. 182).

Then follows (R. p. 119): —

Pearsall v. *Grand Northern Ry.*, 161 U.S. 646, 664.

The court's quotation contains only a statement of the general principle, and, we submit, is not at all in conflict with the later case and more particular decision in the Walla Walla case upon which we rely. (172 U.S. 1.)

The court's last citation upon the point of exclusiveness is —

Long Island Water Supply Co. v. *Brooklyn*, 166 U.S. 685.

As this was relied upon also by defendant's counsel, we have examined it earlier (see *ante*, p. 180), and have shown that it does not conflict with the decision in the Walla Walla case upon which we rely.

Furthermore, it is to be borne in mind that, as already pointed out, the contract between the City and the Water

Company in the Long Island case *was paid for under the condemnation proceedings: and the court held that such payment, instead of being an impairment of the obligation of contracts, was a recognition of such obligation by paying the value thereof.*

In the present case the stipulation (R. 94) shows that the contract was *not* paid for.

Wherefore we submit it remains that, under the Walla Walla decision, the contract gave to the plaintiff Company the exclusive right to furnish to the defendant City a full supply of water for fire purposes during the life of the contract.

C. Said contract for the full supply of water for fire purposes was also exclusive by NECESSARY IMPLICATION.

If the court should hold that we do not sustain the claim that the contract is *expressly* exclusive, we submit that from the terms of the contract and of the act authorizing it, the contract is exclusive by *necessary implication*, and that what we have offered under point A (*ante*, p. 169) is abundantly sufficient to sustain this claim.

Even the cases cited by the defendant show that such exclusiveness may be created *not only in express terms, but also by necessary implication.*

> *Chicago &c. Railway Co.* v. *Minnesota*, 134 U.S. at page 455.
> *Los Angeles* v. *Los Angeles City Water Co.*, 177 U.S. 558, at pages 570, 571.
> *Atlantic Water Works Co.* v. *Atlantic City*, 39 N.J. Eq. at page 376.

In the latter case there was a separate instrument, which contained the only *express* provision for exclusiveness, but the court disregarded this "covenant" and held that —

> "The franchise granted by the legislature to the Company is, *by necessary implication, exclusive.*"

The same facts on the law side of the case were considered in —

Atlantic City Water Works v. *Atlantic City*, 48 N.J. Law, 378, cited with approval in — *Walla Walla* v. *Walla Walla Water Co.*, 172 U.S. at page 14.

We submit, upon inspection, that all the facts deemed necessary by the court in the Atlantic City case to sustain the claim of necessary implication exist in the present case.

Again we call attention to the *dictum* and reasoning of the court in —

Skaneateles Water Co. v. *Skaneateles*, 184 U.S. 354.

The following is from the opinion: —

At page 364: . . . "*We can appreciate the argument that the village had no right to build and use its own plant during the running of the five years' contract*, but we fail to see the force of the claim that, on account of once making a contract with the plaintiff for five years, the village irrevocably bound itself by an implied contract *never* to build its own plant without taking by condemnation the property of the plaintiff if the parties could not agree on terms of purchase."

At page 363: . . . "Admitting that in every grant there is an implication that the grantor will do nothing to detract from the full and complete operation of the grant itself, we cannot find any implication that, *after the termination of the contract the plaintiff and defendant were empowered to make*, there should be no right in the defendant to build its own system of water works under the statute of 1875, unless it purchased or condemned the property of the plaintiff."

At page 365: "*When the contract for the five years had expired* we look in vain for anything in either of the statutes of 1873 or 1875 upon which to base the implied contract contended for." . . .

Wherefore we submit that the contract for a full supply of water for fire purposes was exclusive during the continuance of the contract.

Even if our claim of exclusiveness is denied by the court, it remains that the contract was in existence, and had some time to run when the acts of 1893 and 1894 were passed, *which acts we shall show* (*post*, 198) *impaired the obligation of said contract.*

It is further proved by the stipulation (R. 94) that the contract was not valued in the award, which was confirmed by the state court.

As the stipulation shows that the commissioners were asked by plaintiff's counsel to value the contract, it results that —

II.

THE ACT OF 1894 AS CONSTRUED AND APPLIED DID NOT PROVIDE COMPENSATION FOR THE CONTRACT.

THE LAW APPLICABLE TO THIS CASE IN RESPECT TO THE IMPAIRMENT OF THE OBLIGATION OF CONTRACTS.

It is worth noting that the very frequency of decisions on the impairment of obligation of contracts makes it difficult to decide new cases differing somewhat in facts from old cases.

Barnitz v. *Beverly*, 163 U.S. 121.

We shall consequently limit our references to the few cases which we deem to be the more directly applicable.

First Proposition of Law.

THE CONSTITUTIONAL PROVISION PROHIBITING THE IMPAIRMENT OF THE OBLIGATION OF CONTRACTS RELATES TO AND PROTECTS ALL CONTRACTS, EXPRESS AND IMPLIED.

See *Long Island Water Supply Co.* v. *Brooklyn*, 166 U.S. at page 690:

"*Every contract is equally within the protecting reach of the prohibitory clause of the Constitution.* The charter of a corporation is a contract, and its obligations cannot be impaired."

2 Story on Constitution (5th ed.) sec. 1377:

"Contracts, too, are express, or implied."

. . . . . .

"*The Constitution makes no distinction between the one class of contracts and the other. It then equally embraces and applies to both.*"

Second Proposition of Law.

ANY CONTRACT TO SUPPLY WATER TO A CITY "IS A CONTRACT PROTECTED BY THE CONSTITUTION OF THE UNITED STATES AGAINST STATE LEGISLATION TO IMPAIR IT."

Walla Walla v. *Walla Walla Water Co.*, 172 U.S. at page 9:

. . . "It is sufficient for the purposes of this case to say that this court has too often decided for the rule to be now questioned, that a grant of a right to supply gas or water to a municipality and its inhabitants through pipes and mains laid in the streets, upon condition of the performance of its service by the grantee, is the grant of a franchise vested in the State, in consideration of the performance of a public service, and after performance by the grantee, is a contract protected by the Constitution of the United States against state legislation to impair it. *New Orleans Gas Co.* v. *Louisiana Light Co.*, 115 U.S. 650, 660; *New Orleans Water Works Co.* v. *Rivers*, 115 U.S. 674; *St. Tammany Water Works* v. *New Orleans Water Works*, 120 U.S. 64; *Crescent City Gas Light Co.*

v. *New Orleans Gas Light Co.*, 27 La. Ann. 138, 147.

"It is true that in these cases the franchise was granted directly by the state legislature, but it is equally clear that such franchises may be bestowed upon corporations by the *municipal* authorities, provided *the right to do so is given by their charters*."

Third Proposition of Law.

WHERE A MUNICIPAL CORPORATION — A CITY — MAKES, UNDER LEGISLATIVE AUTHORITY, A CONTRACT WITH A PRIVATE CORPORATION, GIVING THE LATTER THE EXCLUSIVE RIGHT TO FURNISH SUCH CITY WITH GAS OR WATER, ANY SUBSEQUENT LAW PASSED BY THE STATE LEGISLATURE AUTHORIZING SUCH CITY TO FURNISH ITSELF, DURING THE LIFE OF SUCH CONTRACT, WITH GAS OR WATER, OR TO OBTAIN THE SAME FROM ANY THIRD PERSON OR CORPORATION, IMPAIRS THE OBLIGATION OF SUCH CONTRACT; AND IS THEREFORE UNCONSTITUTIONAL AND VOID.

See authority under Second Proposition above.

Fourth Proposition of Law.

ANY LAW WHICH ABRIDGES, OR IN ANY MANNER CHANGES THE INTENTION OF THE PARTIES RESULTING FROM THE STIPULATIONS IN THE CONTRACT, NECESSARILY IMPAIRS THE OBLIGATION OF SUCH CONTRACT. *A fortiori*, A LAW WHICH EXTINGUISHES OR DESTROYS A CONTRACT IMPAIRS THE OBLIGATION OF SUCH CONTRACT.

2 Story on Constitution (5th ed.) sec. 1385:

"In the next place, What may properly be deemed impairing the obligation of contracts in the sense of the Constitution? It is perfectly clear, that any law, which enlarges, ABRIDGES, *or in any manner changes the intention of the parties*, resulting from the stipu-

lations in the contract, necessarily impairs it. The manner or degree in which this change is effected can in no respect influence the conclusion; for whether the law affect the validity, the construction, the duration, the discharge, or the evidence of the contract, it impairs its obligation, though it may not do so to the same extent in all the supposed cases. Any deviation from its terms by postponing or accelerating the period of performance which it prescribes, imposing conditions not expressed in the contract, or dispensing with the performance of those which are a part of the contract, however minute or apparently immaterial in their effect upon it, impairs its obligation. *A fortiori, a law which makes the contract wholly invalid, or extinguishes, or releases it, is a law impairing it.* . . . The obligation to perform a contract is coeval with the undertaking to perform it."

Sturges v. *Crowninshield*, 4 Wheat. at pages *197, 198:

"In discussing the question whether a state is prohibited from passing such a law as this, our first inquiry is, into the meaning of words in common use — what is the obligation of a contract? and what will impair it? . . . A contract is an agreement, in which a party undertakes to do, or not to do, a particular thing. The law binds him to perform his undertaking, and this is, of course, the obligation of his contract. . . . *Any law which releases a part of this obligation, must, in the literal sense of the word, impair it. Much more must a law impair it, which makes it totally invalid, and entirely discharges it.*"

Green v. *Biddle*, 8 Wheat. 2:

(From headnote:) . . . "*The invalidity of a state law, as impairing the obligation of contracts, does*

not depend upon the extent of the change which the law effects in the contract."

(From Opinion, pp. *84, 85:) . . . "Any deviation from its terms, by postponing or accelerating the period of performance which it prescribes, imposing conditions not expressed in the contract, or dispensing with the performance of those which are, however minute, or apparently immaterial, in their effect upon the contract of the parties, impairs its obligation."

Fifth Proposition of Law.

WHERE A CONTRACT HAS BEEN MADE UNDER AUTHORITY CONFERRED BY A STATE STATUTE, ANY LAW WHICH SUCH STATE AFTERWARDS MAKES, AND WHICH INTERFERES WITH OR TAKES AWAY, THE POWER OF ANY PARTY TO SUCH CONTRACT TO PERFORM ITS TERMS, IMPAIRS THE OBLIGATION OF SUCH CONTRACT.

See —

Von Hoffman v. *Quincy*, 4 Wall. at pages 554, 555:

"It is well settled that a state may disable itself by contract from exercising its taxing power in particular cases. It is equally clear that *where a state has authorized a municipal corporation to contract* and to exercise the power of local taxation to the extent necessary to meet its engagements, *the power thus given cannot be withdrawn until the contract is satisfied. The state*, and the *corporation*, in such cases, *are equally bound.* The power given becomes a trust which the donor cannot annul, and which the donee is bound to execute: and *neither the state nor the corporation can any more impair the obligation of the contract in this way than in any other.*"

We submit, upon the same principle, that as the state of Massachusetts authorized the City of Newburyport to

make a contract for a full supply of water for fire purposes and the corporation made such contract, "the state and the *corporation* [that is, the City of Newburyport] . . . are equally bound," and neither can do anything which will prevent a corporation from fulfilling its promises which are necessary to enable it to obtain the payment promised by the city for the performance of such promises. *Any such prevention under any subsequent statute would necessarily be an impairment of the obligation of such contract.*

See also the leading case of —

Curran v. *State of Arkansas*, 15 How. *304:

(From headnote:) "The bills of the bank being payable on demand, there was a contract with the holder to pay them; and these laws, which withdrew the assets of the bank into a different channel, *impaired the obligation of this contract.*"

The opinion was by Mr. Justice CURTIS:

(At page *310:) "Such were these contracts and their obligations; and *it would seem to require no argument* to prove that a law authorizing and requiring such a corporation to distribute its property among its stockholders, or transfer it to its sole stockholder, leaving its bills unredeemed, *would impair the obligation of the contracts* contained in those bills. The cases of *Bronson* v. *Kinzie et al.*, 1 How. 311; and *McCracken* v. *Hayward*, 2 id. 608, which will be more particularly adverted to hereafter, leave no doubt on that point. Indeed it has not been attempted to maintain, that such a law, operating on the property of a mere private corporation, whose charter the legislature could not repeal, would be valid. But it is argued that this is a different case. That *the legisla-*

ture has power to destroy this corporation and thereupon its contracts are no longer in existence, and cannot be enforced against the property of the corporation, which, upon the repeal of its charter, reverts to the grantors of its lands and escheats, so far as it is personalty, to the state, and that, if it be in the power of the state thus to destroy the remedies of creditors, by repealing the charter, their rights must be considered to be entirely subject to the will of the state, and no law can impair the obligation of their contracts, because subjection to any law which may be passed belongs to the very existence of such contracts. Or, to express the same ideas in different words, that the state created and can destroy the corporation and all its contracts, and, as it can thus destroy them by repealing the charter, it can modify, obstruct, and abridge the rights of creditors and the obligations of their contracts, without repealing the charter.

"*Neither these premises, nor the conclusion deduced from them, can be admitted.*"

(At pages *319, 320:) "In that case [*McCracken* v. *Hayward*, 2 How. 608] the law under consideration provided that a sale should not be made of property levied on under an execution, unless it would bring two thirds of its valuation by three householders. It was held that such a law so obstructed the remedy as to impair the obligation of the contract. *The law now in question certainly presents a far more serious obstruction*, for it withdraws the real property of the bank altogether from the reach of legal process, provides no substituted remedy, and leaves the creditor, as is truly said by the Supreme Court of Arkansas, in its opinion in this case, 'in a condition in which *his rights live but in grace, and his remedy in entreaty only.*'"

The conclusion of the court is shown by the above extract from the headnote, viz., —

> "The bills of the bank being payable on demand, there was a contract with the holder to pay them; and these laws, which withdrew the assets of the bank into a different channel, *impaired the obligation of this contract*."
>
> 15 How. 304.

When we come to apply the above settled law to the facts of this case we shall also make use of the following from the opinion in —

> *Long Island Water Supply Co.* v. *Brooklyn*, 166 U.S. at page 690: —
>
> " . . . the contract is a mere incident to the tangible property; that it is the latter which, being fitted for public uses, is condemned. And while the company, by being deprived of its tangible property, is unable to perform its part of the contract, and therefore can make no demands upon the town for performance on its part, it still is true that the contract is not the thing which is sought to be condemned, and *its impairment, if impairment there be, is a mere consequence of the appropriation of the tangible property*. Second, a contract is property, and, like any other property, may be taken under *condemnation proceedings for public use*. *New Orleans Gas Co.* v. *Louisiana Light Co.*, 115 U.S. 650, 673. Its condemnation is *of course subject to the rule of just compensation*."

Sixth Proposition of Law.

IN DETERMINING WHETHER OR NOT A STATUTE IS UNCONSTITUTIONAL, THE DIRECT AND NECESSARY RESULT OF A STATUTE MUST BE TAKEN INTO CONSIDERATION WHEN

DECIDING AS TO ITS VALIDITY, EVEN IF THAT RESULT IS NOT IN SO MANY WORDS EITHER ENACTED OR DISTINCTLY PROVIDED FOR. IN WHATEVER LANGUAGE A STATUTE MAY BE FRAMED, ITS PURPOSE MUST BE DETERMINED BY ITS NATURAL AND REASONABLE EFFECT.

In both the cases cited and quoted below it was decided that the statute in question was unconstitutional. It may also be observed that in each case there was a certain element of compulsion shown in the *effect* of the statute.

Collins v. *New Hampshire*, 171 U.S. 30, at pages 33, 34:

"*The direct and necessary result of a statute* must be taken into consideration when deciding as to its validity, even if that result is *not in so many* words either enacted or distinctly provided for. In whatever language a statute may be framed, its purpose must be determined by its natural and reasonable effect. *Henderson* v. *Mayor of New York*, 92 U.S. 259; *Morgan Steamship Co.* v. *Louisiana*, 118 U.S. 455, at 462. Although under the *wording* of this statute the importer is *permitted* to sell oleomargarine freely and to any extent provided he colors it pink, yet the *permission to sell* when accompanied by the imposition of a condition which, if complied with, will effectually prevent any sale, amounts in law to a prohibition."

Henderson v. *Mayor of New York*, 92 U.S. 259, at pages 268, 269:

"In whatever language a statute may be framed, its *purpose* must be determined by its *natural and reasonable effect*; and if it is apparent that the *object* of this statute *as judged by that criterion*, is to compel the owners of vessels to pay a sum of money for every passenger brought by them from a foreign

shore, and landed at the port of New York, it is as much a tax on passengers if collected from them, or a tax on the vessel or owners for the exercise of the right of landing their passengers in that city, as was the statute held void in the Passenger Cases.

"*To require a heavy and almost impossible condition to the exercise of this right*, with the alternative of payment of a small sum of money, is, IN EFFECT, to *demand* payment of that sum. . . . It is a law *in its purpose and effect* imposing a tax on the owner of the vessel for the privilege of landing in New York passengers transported from foreign countries."

Mugler v. *Kansas*, 123 U.S. 623, at page 661:

. . . "*The courts are not bound by mere forms, nor are they to be misled by mere pretences.* They are at liberty — indeed, *are under a solemn duty* — to look at the *substance* of things, *whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority.*"

Seventh Proposition of Law.

THE RESERVED POWER DOES NOT GIVE TO THE STATE OR THE MUNICIPALITY THE RIGHT TO EXTINGUISH THE CONTRACT, ALTHOUGH BY IT THE STATE MAY HAVE THE POWER TO DESTROY THE CORPORATION.

This is distinctly held in —

Curran v. *Arkansas*, 15 How. at page *310, quoted *ante*, p. 192.

For further argument upon this point see argument under "Reserved Power," *post*, p. 211.

APPLICATION OF THE SAID PRINCIPLES OF LAW TO PLAINTIFF'S RIGHTS UNDER THE CONTRACT TO FURNISH WATER FOR FIRE PURPOSES.

We have shown the fundamental rule that the provision prohibiting the impairment of the obligation of contracts relates to and protects *all* contracts, express and implied (First Proposition of Law, *ante*, p. 187), and specifically, that any contract to supply water to a city "is a contract protected by the Constitution of the United States against state legislation to impair it." (Second Proposition of Law, *ante*, p. 188.)

Our contract is therefore protected from impairment by state legislation.

Having established —

I.

That plaintiff and defendant made, under the authority of the state, an exclusive contract for the City's water supply for fire purposes during the continuance of the contract and not exceeding twenty years, — and when the statutes of 1893 and 1894 were enacted the contract had several years yet to run, —

II.

That the act of 1894, as construed and applied, did not provide compensation for the contract;

We proceed, with the aid of the above propositions of law, to point —

III.

IF THE ACT OF 1893 WAS IN FORCE AFTER THE CITY VOTED NOT TO PURCHASE, SAID ACT IMPAIRED THE OBLIGATION OF PLAINTIFF'S SAID CONTRACT TO FURNISH THE STATE WITH A FULL SUPPLY OF WATER FOR FIRE PURPOSES DURING THE LIFE OF SAID CONTRACT.

We have shown that plaintiff's contract was exclusive both expressly and by necessary implication. (Point I., *ante*, pp. 168 *et seq.*)

We have also shown that where a municipal corporation — a city — makes, under legislative authority, a contract with a private corporation, giving the latter the ex-

clusive right to furnish such city with gas or water, any subsequent law passed by the state legislature, authorizing such city to furnish itself, during the life of such contract, with gas or water, or to obtain the same from any third person, or corporation, impairs the obligation of such contract, and is therefore unconstitutional and void. (Second and Third Propositions of Law, *ante*, pp. 188, 189.)

The act of 1893 provided that "the city of Newburyport *may supply itself* . . . with water for the extinguishment of fires," etc. (c. 471, sec. 1).

If, then (as the Circuit Court intimates, but does not determine*), the act of 1893 became operative, — although the City voted "not to purchase," here is a palpable impairment of the obligation of plaintiff's said contract. (See Second Proposition of Law, *ante*, p. 188.)

This impairment continued at least until the sale was made under the act of 1894.

And the impairment by the act of 1893 continued (*a*) if the act of 1894 was unconstitutional (and therefore void), or (*b*) if the sale under the act of 1894 was compulsory in fact and in law.

(*a*) Obviously, one unconstitutional act could not be held to validate the unconstitutionality in a previous act.

(*b*) If the sale under the act of 1894 was compulsory in law, it was not binding upon the plaintiff, and therefore such sale could not affect its right to protection against the unconstitutionality of the act of 1893.

IV.

THE ACT OF 1894 (INCLUDING THE ACT OF 1893 AS REVIVED AND AMENDED BY THE ACT OF 1894) IMPAIRED THE OBLIGATION OF SAID CONTRACT, UNLESS THE PLAIN-

*Plaintiff still claims, as argued *ante*, pp. 93 *et seq.*, that the act of 1893 was void because of said vote not to purchase.

TIFF COMPANY WAIVED ITS CONSTITUTIONAL RIGHTS BY MAKING A VOLUNTARY SALE.

THE SALE WAS NOT VOLUNTARY; BUT WAS COMPULSORY IN FACT AND IN LAW.

The act of 1894 provided that the Water Company might, within thirty days after the passage of the act, notify the City of its desire to sell its property, and that "said city shall not proceed to supply water to itself or its inhabitants under the authority of chapter 471 of the acts of 1893, unless it shall have first purchased of said Company the property aforesaid." (R. 33.)

Whether the act of 1893 became void upon the City's vote not to purchase (as we claim and show, *ante*, pp. 93 *et seq.*), or whether it continued in force up to the passage of the act of 1894, it is obvious that the act of 1894 revived or re-enacted the provisions of the act of 1893, authorizing municipal competition *unless* the Water Company should make a voluntary sale of its property to the city.

We submit, therefore, that as the act of 1893 impaired the obligation of plaintiff's contract, it follows that the effect of the act of 1894 which revived or re-enacted the former act, must have been the impairment of this contract, unless the Water Company made a voluntary sale of its property to the city.

And this follows even if plaintiff's contract was not exclusive.

For a brief consideration of the facts will show that the act of 1894, including the act of 1893 as revived and amended by the act of 1894, abridged and changed the intention of the parties resulting from the stipulations in the contract; that the effect of said legislation was to extinguish or destroy said contract; that, although said contract had been made under authority conferred by said act of 1880, the act of 1893 and the act of 1894 jointly and severally interfered with and took away the power of the

plaintiff to perform its terms, any one of which results would be an impairment of the obligation of plaintiff's contract.

See Fourth, Fifth, and Sixth Propositions of Law, *ante*, pp. 189 *et seq.*

Municipal competition meant ruin, and ruin would have rendered the plaintiff Company unable to perform its part of the contract to furnish water for fire purposes, and would therefore have destroyed plaintiff's right to demand of the City the annual rental provided by the contract.

"The great injury which at this time threatened the company's property was municipal competition under the act of 1893, and the act of 1894 was passed as a protection against such *impending* DISASTER."

Opinion of COLT, J., August 8, 1900, p. 12. (R. 122.)

To same effect see cases cited in argument upon Fourteenth Amendment, Point VI., subdivision 1 (*ante*, pp. 89 *et seq*).

That impairment of the obligation of the contract is "a consequence of the appropriation of the tangible property," see —

Long Island Water Supply Co., v. *Brooklyn*, 166 U.S. at page 690, quoted under Fifth Proposition of Law, *ante*, p. 194.

Therefore, unless there was a voluntary sale by the Water Company to the City, we submit that the legislation complained of impaired the obligation of plaintiff's contract.

But the sale under the act of 1894, though voluntary in form and appearance, was compulsory in fact and in law.

We claim and submit that this proposition has been fully established under our argument upon the Fourteenth Amendment.

That argument is based, however, upon the assumption that the threat of municipal competition, in and of itself, would have been a LAWFUL *threat.*

We now undertake to show that the threat of municipal competition, in and of itself, was unlawful; because it violated the obligation of plaintiff's contract with the city, which had been made under the authorization of the State.

In the opinion rendered by the Circuit Court in this case August 8, 1900, the court assumed that the sale was compulsory *in fact.* (R. 123.)

Apparently the only reason why the Circuit Court did not decide that the legislation complained of was in violation of plaintiff's rights of due process of law under the Fourteenth Amendment was that the court held that the threat of municipal competition was a *lawful* threat. That court, in its opinion of August 8, 1900, said, —

> "In the case at bar there was no moral duress not justified by law, because it was lawful for the State to authorize, or threaten to authorize, municipal competition. There would have been a close analogy between those cases aud the present, *if the plaintiff had possessed an exclusive franchise*, and the legislature had, contrary to law, *authorized*, or *threatened* to authorize *municipal competition*. *In that event* it might have been claimed that the company was compelled to convey its property to the city under an *unlawful* exercise of legislative power, *and, therefore, under moral duress not justified by law.*" (R. 127.)

We have shown —

That plaintiff's contract was exclusive both expressly and by necessary implication. (See *ante*, pp. 168 *et seq.*)

That the act of 1894, as construed and applied, did not provide payment for the contract. (See *ante*, p. 187.)

That all contracts, whether franchises or other forms of contract, are equally within the protection of the constitutional provision (*ante*, pp. 187–188).

That the legislation complained of authorized municipal competition, and thus in effect threatened (*a*) to extinguish or destroy the contract without compensation; (*b*) to interfere with and take away the power of the plaintiff to perform its terms (*ante*, pp. 199, 200).

Wherefore we claim and submit that the case as now presented falls completely and specifically within the rule indicated in the above quotation from the Circuit Court's opinion of August 8, 1900 (R. 127), and that therefore the court should hold that *the sale under the act of 1894*, though voluntary in form and appearance, was compulsory in fact and *in law*.

And this, we submit, is true, even if the contract was *not* exclusive.

For the acts of 1893 and 1894 (as we have shown *ante*, pp. 89, 199–200) would inevitably result in the ruin of the Company, and would thus in effect not only impair the obligation of the contract, but would extinguish the contract as originally made, which was that plaintiff should furnish water during the term of the contract, unless the City should in the mean time buy out the Company *upon the terms* provided in the act of 1880. (R. 26, 27.)

Under those terms of sale the Company would have been paid for the said contract and its franchise rights to the use of the streets and to collect water rates; and, as we have shown, such payment would have prevented the impairment of the obligation of contracts, because such payment would have been in conformity with such obligation.

It it be settled law that, where there is no exclusive franchise, or exclusive contract, the state may lawfully authorize municipal competition, even if it should result in the ruin

of the local Company, we submit we have shown that such rule is subject to the following limitation; to wit, —

Where such Company has a duly authorized (exclusive or non-exclusive) contract with the municipality for an unexpired term, any new state statute which, without paying for such contract, will, in effect, abridge or extinguish the contract, or will prevent or impede the local Company's performance thereof, impairs the obligation of such contract, and is unconstitutional and void.

> See Fourth Proposition of Law, *ante*, pp. 189 *et seq.*, and Fifth Proposition of Law, *ante*, pp. 191 *et seq.*

No decision to the contrary has yet been adduced.

We submit that our claim is supported by the principles of the decisions cited and quoted; and especially by the dictum in —

> *Skaneateles Water Co.* v. *Skaneateles*, 184 U.S. 354.

The following is from the opinion: —

> *At page 364:* . . . "We can appreciate the argument that *the village had no right to build and use its own plant during the running of the five years' contract*, but we fail to see the force of the claim that, on account of once making a contract with the plaintiff for five years, the village irrevocably bound itself by an implied contract *never* to build its own plant without taking by condemnation the property of the plaintiff if the parties could not agree on terms of purchase."
>
> *At page 363:* . . . "Admitting that in every grant there is an implication that the grantor will do nothing to detract from the full and complete operation of the grant itself, we cannot find any implication that, *after the termination of the contract the plaintiff and defendant were empowered to make*, there should be no right

in the defendant to build its own system of waterworks under the statute of 1875, unless it purchased or condemned the property of the plaintiff."

At page 365 : "*When the contract for the five years had expired* we look in vain for anything in either of the statutes of 1873 or 1875 upon which to base the implied contract contended for." . . .

Wherefore we claim and submit, —

That the act of 1894 (including the act of 1893 as revived and amended by the act of 1894) impaired the obligation of said contract.

We submit the above conclusion is not changed by the decision or reasoning in the recent case of —

Joplin v. *South West Missouri Light Co.*, 24 U.S. Supreme Court Reporter (part No. 2), p. 43, decided November 16, 1903 :

Headnote : "An implied contract that the city will not, for twenty years, enter into the business of commercial electric lighting, does not arise from a municipal grant to certain persons under the authority of Mo. Laws, 1891, p. 60, of the right to erect and maintain an electric light plant for that period, where such grant is not exclusive."

This case can be readily distinguished from the present water cases, and from the principles and authorities by which we seek to hold that the contract for water for fire purposes was exclusive, both expressly and by necessary implication.

So far as appears in the Joplin case, there was no express contract between the City and the local Company, while here there was not only an express contract, authorized by the state for a term of years, but a contract which expressly provided that the plaintiff should furnish to the defendant a *full* supply of water for fire purposes, which

made such contract both expressly and by implication exclusive, as above shown.

In the Joplin case the court held (at page 44), —

> "It is by *implication* from the *statute and the ordinance passed under it, not from the explicit expression of either*, that the conclusion is deduced that the city is precluded from erecting its own lighting plant, *and yet it is conceded that the grant to the appellee is not exclusive*. That is, it is conceded the city has not exhausted its power under the statute by the grant held by appellee, but may make another to some other person than the appellee. In other words, that the city may make a competitor to appellee, but cannot itself become such competitor."

In the present case we do not need to resort to the statute for any implication. The exclusiveness of the contract arises from the terms of the contract itself, to furnish a *full* supply of water for fire purposes. Nor do we concede that the City could make a contract for water for fire purposes with any other person than the plaintiff corporation. The cases above cited show that where one contracts to furnish another with full supply, such right *is exclusive*, and we therefore submit that the Joplin case is distinguishable from the present case, and that not to hold the plaintiff's contract for water for fire purposes exclusive would be in effect to overrule the settled law as to what, at least by necessary implication, constitutes an exclusive contract.

Moreover, we submit that, by implication, what the court says in the Joplin case concerning the Skaneateles case tends to support our claim as to the impairment of the obligation of the *contract for water for fire purposes*.

The court said,—

> "It is true there was an element in that case which is not in the case at bar. The village of Skanea-

teles had entered into a contract with the water company to take water from the company. This contract had expired before the city constructed its works. *It was not that contract, however, which was alleged to have been impaired, but that which the water company claimed to have been implied by reason of its organization and incorporation*, and in pursuance of the application made to, and with the consent of, the village authorities. The ultimate reliance, therefore, of the water company was that from the *grant* to it the village impliedly contracted not to construct works of its own. The similarity of the contention with that in the case at bar is apparent."

Ibid. p. 45.

In the same line the court, after considering the Walla Walla case, said, —

"In the case at bar, restraint upon the power of the appellant city is claimed to be *implied* by the *grant* to the appellee."

Ibid. p. 45.

Our reliance in the present case is *not* upon the *grant*, but upon the *contract* made with the city under the express authority of the state statute; and we submit that under the principles of the authorities above cited by us, which are thus in effect confirmed by the above distinction in the Joplin case, it remains that the act of 1894 (including the act of 1893 as revived and amended by the act of 1894) impaired the obligation of said contract.

We submit it follows that we have established the seventh, ninth, and tenth assignments of error.

(See assignment VII., R. 132; also *ante*, p. 18; assignments IX. and X., R. 133; also *ante*, p. 19.)

V.

PLAINTIFF WAS ENTITLED TO ACT UPON THE THREAT; THE LAW DOES NOT COMPEL THE VICTIM TO WAIT UNTIL RUIN OVERTAKES HIM AND THEN LEAVE HIM TO RESORT TO A COURT OF LAW FOR DAMAGES; BUT HE IS ENTITLED TO RELIEF IN EQUITY.

That the *threat* itself (without awaiting the resulting ruin) constitutes the impairment recognized by the present court is already shown in the extract given from the said opinion of August 8, 1900, by COLT, J.:

> "There would have been a close analogy . . . if . . . the legislature had, contrary to law, authorized or *threatened* to authorize municipal competition."

This opinion is fully sustained by the opinion in—

> *Walla Walla* v. *Walla Walla Water Co.*, 172 U.S. pp. 11–13, par. 3.

While plaintiff was *entitled* to act upon the threat, the Circuit Court has already sustained our claim that plaintiff was not *bound* to act earlier than it acted when its bill in the present case was filed.

> See also the subject of *Laches*, Point XIV., *ante*, p. 134.

VI.

1. ALTHOUGH WE HAVE ONLY ARGUED UNDER THE CONTRACT CLAUSE OF THE CONSTITUTION THAT THE PROVISIONS IN THE SAID ACTS OF 1893 AND 1894, AUTHORIZING THE CITY TO FURNISH ITSELF WITH WATER FOR FIRE PURPOSES, IS UNCONSTITUTIONAL, IT FOLLOWS THAT SAID ENTIRE ACTS WERE UNCONSTITUTIONAL AND VOID.

2. THE SPECIFIC RELIEF WHICH MAY BE FINALLY GRANTED NEED NOT BE DETERMINED NOW. IT IS SUF-

FICIENT AT PRESENT TO SHOW THAT WE MAY BE ENTITLED TO ANY FINAL RELIEF IN RESPECT TO THE PROPERTY IN ISSUE.

UNDER THE PRINCIPLES OF EQUITY WE ARE ENTITLED AT LEAST TO A CANCELLATION OF THE DEED AND A RESTORATION OF THE PROPERTY.

1. For our main argument upon this point, see Point XIII., *ante*, pp. 130 *et seq.*, which, we submit, applies *pro tanto* to the fact that the provisions of the act of 1893 contemplate that the City's authority to furnish water for fire purposes and water for domestic and other purposes is an obvious *entirety*. The language of the act confirms this claim:

> "The city of Newburyport may supply itself and its inhabitants with *water for the extinguishment of fires and for domestic, manufacturing, and other purposes*, and may establish fountains and hydrants, relocate or discontinue the same; may regulate the use of such water and fix and collect rates to be paid for the use of the same."
>
> Act of 1893, c. 471, sec. 1. Appendix, *post*.

Wherefore we claim and submit that, although we have only argued, under the contract clause of the Constitution, that the provisions in the said acts of 1893 and 1894 authorizing the City to furnish itself with water for fire purposes is unconstitutional, it follows that said entire acts were unconstitutional and void.

> See similar Point XIII. under Fourteenth Amendment, *ante*, pp. 130 *et seq.*

2. For proof of subdivision 2 of this Point VI., see Point XV., under Fourteenth Amendment, *ante*, p. 140.

VII.

THE STATE, LIKE AN INDIVIDUAL, IS ESTOPPED BY CONTRACTS MADE BY IT OR UNDER ITS AUTHORITY; AND IS ESTOPPED HERE BY THE AUTHORIZED CONTRACT FOR WATER FOR FIRE PURPOSES FROM TAKING ANY POSITION TENDING TO PREVENT THE PLAINTIFF FROM CARRYING OUT SUCH CONTRACT.

As to estoppel of the state, see —

BIGELOW on Estoppel (5th ed.) at pages 340, 341, —

"The question whether an estoppel of this kind is available against the state arose in *Commonwealth* v. *André* [3 Pick. 224]. It appeared that a committee of the legislature, duly authorized, granted by deed to Pierre Mathieu André, his heirs and assigns, with warranty, a certain tract of land. André at the time was an alien subject of France. The purchase was made for the benefit of one Billon, also a subject of France. Upon the death of these persons intestate the attorney-general, pursuant to an act of the legislature, filed an information to recover the land, alleging that it ought to escheat to the commonwealth for defect of title in any person who could by law hold it. But the court held the commonwealth estopped by its deed. 'The deed of the commonwealth,' said the Chief Justice, 'to the very persons now defending as heirs to André, to whom and to whose heirs the grant was made, is, we think, as estoppel against setting up the alienage of those persons as the ground of recovery.' And this is perhaps the better opinion." *

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* Among the cases there cited see particularly *Branson* v. *Wirth*, 17 Wall. 32, 42.

Estoppel by contract.

Ibid. at page 459:

"The first class of cases under the head of ***Estoppel by Contract***, as stated in the preceding chapter, arises where there is an actual or a virtual undertaking to treat a fact as specifically settled. Stated in full, the general rule of law appears to be this: A fact agreed or assumed to be true, as the basis of a contract, must be taken to be true specifically, until the contract itself is lawfully impeached by plaintiff or by defendant, or until some legal proceeding is taken to impeach the truth of the [supposed] fact; assuming that the contract itself is not contrary to law. In other words, supposing the contract to be lawful and binding, the party or parties [it may be one, it may be all] pledging or justly assuming the fact in question will be *estopped from taking any position, to the detriment of other parties, inconsistent with the special fact*, except for the purpose of reforming the language of a written contract and making it conform to the real terms of agreement."

We beg to quote further from the opinion in —

Commonwealth v. *André*, 3 Pick. 224, at page 225, as follows: —

"This deed must operate as a rebutter, as it would if an individual were the grantor; and with more reason, because the commonwealth is not liable to an action. The commonwealth, if the land were recovered, would feel itself bound to repay the consideration money, with interest. *This would be a claim which could not be resisted without degrading the country.*"

As the contract for water supply was made for a term of years by the express authority of the legislature, we

submit that to uphold any action authorized by a state statute which would tend to destroy the contract or to prevent the plaintiff Company from fulfilling it without compensation to the plaintiff could not be done "without degrading the country," to wit, both the state of Massachusetts which authorized the contract, and the United States, which would have failed to secure to plaintiff the guaranties of the Fourteenth Amendment and of the contract clause of the Constitution.

As to Anticipated Defences.

We have already considered the preliminary defences under the heading, "Concerning special grounds alleged by defendant," as barring plaintiff's right to be heard on the merits. (See *ante*, pp. 46 *et seq.*)

We have also considered defendant's claim of laches, Point XIV., *ante*. It remains to consider the further defences which, as they were presented in the court below, we anticipate may be urged here, namely, *the Reserved Power over Corporate Franchises*, and the *Police Power*.

Both these defences were urged in the hearings before the Circuit Court, but were disregarded, and by implication held to be invalid.

VIII.

As to the Reserved Power of Massachusetts over Corporate Franchises.

When plaintiff's bill was brought, the reserved power was contained in the Public Statutes of Massachusetts, c. 105, sec. 3, as follows: —

> "Sect. 3. Every act of incorporation passed after the eleventh day of March in the year eighteen hundred and thirty-one shall be subject to amendment, alteration, or repeal at the pleasure of the general court: but the corporation, notwithstanding such re-

peal, shall be subject to the provisions of sections forty-one and forty-two; and such amendment, alteration, or repeal shall not take away or impair any other remedy which may exist by law consistently with those sections against the corporation, its members or officers, for a liability previously incurred."

That section has now been embodied in the Revised Laws of Massachusetts, c. 109, sec. 3, which is as follows: —

"Section 3. Every act of incorporation passed since the eleventh day of March in the year eighteen hundred and thirty-one shall be subject to amendment, alteration or repeal by the general court. All corporations which are organized under general laws shall be subject to such laws as may be hereafter passed affecting or altering their corporate rights or duties or dissolving them. Corporations shall, notwithstanding such repeal or dissolution, be subject to the provisions of sections fifty-three and fifty-four. Such laws of amendment, alteration or repeal or such dissolution shall not take away or impair any remedy which may exist by law consistently with said sections against the corporation, its members or officers, for a liability previously incurred."

The defendant has hitherto claimed, and will presumably claim here, that under said reserved power the legislature had *plenary* power over the plaintiff's franchise rights, and that therefore, even if the proceedings here complained of amounted to a taking without compensation, such taking would not be in violation of due process of law under the Fourteenth Amendment, nor in violation of the clause of the Constitution relating to the obligation of contracts.

To these attempted defences, we make answer as follows: —

1. THE POWER OF THE LEGISLATURE UNDER THE RESERVED POWER IS NOT PLENARY; IT HAS ITS LIMITS.

This was conceded by Chief Justice SHAW in 1859 in —

Commonwealth v. *Essex Company*, 13 Gray, 239, at page 253.

The headnote is as follows: —

"The Essex Company, having made and maintained a fishway in their dam across the Merrimac River, to the satisfaction of the county commissioners, as required by their charter (St. 1845, c. 163,) and having duly accepted the act of 1848, c. 295, authorizing them to increase their capital stock on condition that they should be liable for all damages occasioned by their dam to the owners of the fish rights above it, and having paid large sums of money for such damages, cannot afterwards be required by the legislature, in the exercise of their power to regulate fisheries, to make different fishways; notwithstanding the Rev. Sts. c. 44, § 23, reserving to the legislature the right to amend, alter or repeal charters."

It may be observed that in the present case no claim has been made that the franchises of the Water Company have been *repealed*. Indeed, the contrary has been conceded. But it is claimed that the effect of the legislation was to *amend* or *alter* these rights under the reserved power.

A similar claim was made in the above case, *Commonwealth* v. *Essex Company*, and concerning it, Chief Justice SHAW said as follows: —

At pages 253, 254: "Does this come within the power of the legislature to *amend* or *alter*? *It seems to us that this power must have some limit, though it*

is difficult to define it. Suppose an authority has been given by law to a railroad corporation to purchase a lot of land for purposes connected with its business; and they purchased such lot from a third party; could the legislature prohibit the company from holding it? If so, in whom should it vest; or could the legislature direct it to revest in the grantor, or escheat to the public; or how otherwise?

"Suppose a manufacturing company incorporated is authorized to erect a dam and flow a tract of meadow, and the owners claim gross damages, which are assessed and paid; can the legislature afterwards alter the act of incorporation so as to give to such meadow-owners future annual damages? Perhaps from these extreme cases — for *extreme cases are allowable to test a legal principle* — the rule to be extracted is this: that where, under power in a charter, rights have been acquired and become vested, *no amendment or alteration of the charter can take away the property or rights which have become vested under a legitimate exercise of the powers granted.*

"It appears to us, in the present case, that after the government, acting in behalf of the public, and also of all those riparian owners whose fish rights would be damnified by the defendants' dam, with the fishway as it was, entered into a solemn and formal contract with the defendant company to exempt them from the obligation of making and maintaining a suitable and sufficient fishway, if such were practicable, by indemnifying all parties damnified in their several fisheries, and the defendant company had executed their part of the contract by the payment of a large sum of money, it was not competent for the legislature, with-
[*254] out any change of circumstances, under *their authority to amend and alter the charter of the

17520

company, to pass a law requiring them to do the acts from which, by the terms of such contract, they had been exempted, and *therefore that the said act was null and void*, and this indictment founded upon it cannot be maintained."

The above case is cited in —

Watuppa Reservoir Co. v. *Fall River*, 147 Mass. 548.

The citation is in a dissenting opinion by KNOWLTON, J. (now Chief Justice).

We quote the following: —

At pages 569–570: "The right to regulate the business or repeal the charters of certain corporations, reserved in the act of March 3, 1809, to which this charter is made subject, and the similar right in the broader statute of 1831, c. 81 (Pub. Sts. c. 105, sec. 3,) have their limitations. In dealing with the latter statute, Chief Justice SHAW, in *Commonwealth* v. *Essex Co.*, 13 Gray, 239, 253, says: 'The rule to be extracted is this: that where, under power in a charter, rights have been acquired and become vested, no amendment or alteration of the charter can take away the property or rights which have become vested under a legitimate exercise of the powers granted.' I am not aware that this proposition of law has ever been controverted; and there are similar intimations or statements in numerous cases in our reports, and in those of the Supreme Court of the United States. *Commonwealth* v. *New Bedford Bridge*, 2 Gray, 339, 348. *Commissioners on Inland Fisheries* v. *Holyoke Water Power Co.*, 104 Mass. 446, 451. *Parker* v. *Metropolitan Railroad*, 109 Mass. 506, 508. *Bing-*

hamton Bridge, 3 Wall. 51. *Holyoke Co.* v. *Lyman*, 15 Wall. 500, 522."

[It should be noted that the dissent is not upon any difference of opinion as to the rule formulated by Chief Justice SHAW and quoted by Mr. Justice KNOWLTON. The difference between the majority and minority of the court was upon the earlier question whether or not there was a contract. In the present case the contract is clear and admitted, namely, a contract authorized by the legislature to furnish water for fire purposes for a term of years. R. 2, 3.]

See also opinion of GRAY, J., in —

Commissioners &c. v. *Holyoke Water Power Co.*, 104 Mass. 446, at page 451.

2. THE MASSACHUSETTS RESERVED POWER IS CONTAINED, NOT IN ITS CONSTITUTION, BUT IN THE STATUTE, AND SUCH RESERVED POWER CANNOT BIND ANY SUCCEEDING LEGISLATURE WHICH MAY CHOOSE TO MAKE A CONTRACT NOT SUBJECT TO BE ALTERED OR REPEALED.

New Jersey v. *Yard*, 95 U.S. 104, at pages 111, 112.

3. "THE POWER TO ALTER OR AMEND DOES NOT EXTEND TO THE TAKING OF THE PROPERTY OF THE CORPORATION EITHER BY CONFISCATION OR INDIRECTLY BY OTHER MEANS."

The above principle is a quotation from the opinion in —

Lake Shore &c. Ry. Co. v. *Smith*, 173 U.S. 684, at page 698.

In that case it was argued that the reserved power to repeal, alter, and amend included the power to regulate rates; and that a statute effecting such regulation would

therefore not be deemed unconstitutional.* In that case the court said, —

> *At page 698:* "The power to enact legislation of this character cannot be founded upon the mere fact that the thing affected is a corporation, even when the legislature has power to alter, amend or repeal the charter thereof. *The power to alter or amend does not extend to the taking of the property* of the corporation *either by confiscation* or *indirectly* by other means."

And the court held that such attempted statutory regulation was "a violation of that part of the Constitution of the United States which forbids the taking of property without due process of law."

Ibid. p. 699.

The defendant's argument in the present case is similar to that which was condemned in the above case. The language of the acts of 1893 and 1894 shows no direct attempt to alter or amend the charter of the Water Company.

We claim to have shown that the act of 1893 was void by the City's vote not to purchase; and in that case the

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* [It is interesting to note that one of the arguments was that the Company had voluntarily contracted to do in other directions substantially what the statute compelled it to do. Upon this point the court said, —

> "What the company may choose voluntarily to do furnishes no criterion for the measurement of the power of a legislature. *Persons may voluntarily contract to do what no legislature would have the right to compel them to do.*"]

173 U.S. at page 697.

only possible alteration in the Company's rights was the price to be paid for its property. The original legislation had provided that the city might buy at the full price; the act of 1894 provided that the Water Company should be paid for only part of its property, which, under the constitutional provision requiring just compensation could never have been required. We submit that the language of the court above quoted is peculiarly applicable here: "The power to alter or amend does not extend to the taking of the property of the corporation *either by confiscation or indirectly by other means.*"

4. WHERE A CONTRACT HAS BEEN MADE UNDER THE AUTHORITY OF A STATE THE RESERVED POWER CANNOT BE EXERCISED UNTIL THE CONTRACT IS SATISFIED.

Although the legislature has, generally speaking, power to destroy the corporation, the exercise of such power would nevertheless be an impairment of the obligation of contracts.

See Fifth Proposition of Law, *ante*, p. 191, and the cases there cited and quoted.

[Of course the contract can be "taken" like other property, *if paid for.*]

5. THE GREENWOOD CASE.

The case of —

Greenwood v. *Freight Co.* 105 U.S. 13, —

is constantly cited against us. It is readily distinguishable from the Newburyport and Gloucester cases.

The corporation in the Greenwood case having the same relative position as the Water Company was the Marginal Freight Company.

The corporation having the position corresponding to that of the City, was the Union Freight Company.

The Union Freight Company *received all its franchises directly from the legislature* by chapter 342 of the acts of 1872.

By the same act, sec. 7, the *charter of the Marginal Freight Company was absolutely repealed*, and all its franchise rights were thus taken away from it.

In the case of the Union Freight Company, *the language of the act admits no possible claim of construction that the Union Freight Company received its franchises, or any of them, from the Marginal Freight Company.*

Note that the reserved power is that every act of incorporation shall be subject to "*amendment, alteration or repeal.*" The Greenwood case was a case of absolute *repeal.*

Acts of 1872, c. 342, sec. 7:

> "Chapter one hundred and seventy of the acts of the year eighteen hundred and sixty-seven, entitled an act to incorporate the Marginal Freight Railway Company, and so much of chapter four hundred and sixty-one of the acts of the year eighteen hundred and sixty-nine, as relates to said Marginal Freight Railway Company, are hereby *repealed.*"

See Appendix, *post.*

Had similar language been used in our Water Company cases, we could not have made the claim which we have made, and which Judge COLT assumes, namely, that the cities received some of their franchises from the water companies.

But the *charters of the water companies were not repealed*, and no such claim has been made.

The cities tried hard enough to get straight unencumbered water charters from the legislature, but the legislature refused to grant them. Instead of so doing, it adopted the device of making the water companies appear to make a voluntary sale. But, inasmuch as the legislature forced

the water companies to include franchise rights in the sale, and provided no compensation for such franchise rights, it seems inevitable, notwithstanding the decision of the Circuit Court, that the compulsion in fact was also compulsion in law; because it included an element of illegality; namely, the compulsion to convey *all* of our property and to accept in payment the value of only *part* of our property, and thus in effect took part of our property without providing just compensation or any compensation.

In order that the court may verify our claims as to the legislation in the Greenwood case, we have placed in the appendix hereto copies of the Massachusetts statutes involved.

Applying the foregoing principles to our claims both under the Fourteenth Amendment and under the contract clause of the Constitution, we claim and submit, —

First. That obviously the legislature of Massachusetts made no attempt to either amend, alter, or repeal the charter or franchise rights of the plaintiff corporation, and therefore any claim by the defendant as to the operation of the reserved power in this case is untenable.

Second. That if there were any legislative attempt to use the reserved power to alter or amend, it was an attempt to do so either by confiscation, or indirectly by other means, which will not be permitted.

> *Lake Shore &c. Ry. Co.* v. *Smith*, 173 U.S. at page 698, quoted *ante*, p. 216.

Third. In any event the contract for water supply for fire purposes for a term of years was, as already shown (*ante*, 210), inviolable during such term.

Fourth. We have already shown (*ante*, Point VII., p. 209) that the state and its agent, the defendant municipal corporation, were estopped by such contract from taking any position inconsistent therewith.

Wherefore we claim and submit that the Circuit Court was justified in disregarding the attempted defence under the reserved power, and that such defence should not be sustained here.

IX.

AS TO THE POLICE POWER.

The defendant has hitherto claimed that the legislation complained of is justified on the ground of the police power, and that the legislation is valid under such power, even if the result was a taking without compensation as complained of.

The Circuit Court held in the present case that "the taking complained of in this case was . . . *not* under the guise of taxation or *police regulation*." (R. 116.) We claim, therefore, that this defence is not open to the defendant herein, who has taken no appeal and filed no assignment of error. As, however, the court may not allow this claim, we offer the following argument upon the questions involved therein: As the present court has declined to give a comprehensive definition of the police power, but has held, in effect, that each case must be judged by itself, we can only present such principles as the court has already laid down, and which we think should govern the present case.

1. *No right granted or secured by the Constitution of the United States can be impaired or destroyed by a state enactment even under the police power.*

Connolly v. *Union Sewer Pipe Co.*, 184 U.S. 540, at page 558:

> "The question of constitutional law to which we have referred cannot be disposed of by saying that the statute in question may be referred to what are called the police powers of the State, which, as often stated by this court, were not included in the grants

of power to the General Government, and therefore were reserved to the States when the Constitution was ordained. But as the Constitution of the United States is the supreme law of the land, anything in the Constitution or statutes of the States to the contrary notwithstanding, a statute of a State, *even when avowedly enacted in the exercise of its police powers, must yield to that law*. No right granted or secured by the Constitution of the United States can be impaired or destroyed by a state enactment, *whatever* may be the source from which the power to pass such enactment may have been derived. 'The nullity of any act inconsistent with the Constitution is produced by the declaration that the Constitution is the supreme law.' The State has undoubtedly the power, by appropriate legislation, to protect the public morals, the public health and the public safety, but if, by their necessary operation, its regulations looking to either of those ends amount to a denial to persons within its jurisdiction of the equal protection of the laws, they must be deemed unconstitutional and void. *Gibbons* v. *Ogden*, 9 Wheat. 1, 210; *Sinnot* v. *Davenport*, 22 How. 227, 243; *Missouri, Kansas & Texas Railway* v. *Haber*, 169 U.S. 613, 626."

The same principle was expressed in —

Allgeyer v. *Louisiana*, 165 U.S. at page 591, as follows: —

. . . "To deprive the citizen of such a right as herein described without due process of law is illegal. Such a statute as this in question is not due process of law, *because it prohibits an act which under the Federal Constitution the defendants had a right to perform*. This does not interfere in any way with the acknowledged right of the State to enact such legis-

lation in the legitimate exercise of its police or other powers as to it may seem proper. In the exercise of such right, however, care must be taken not to infringe upon those other rights of the citizen which are protected by the Federal Constitution."

2. *As the police power apparently permits, in some instances, the taking or destruction of property by the State, without compensation, in order to permit such result it must be clearly ascertainable by the court from the statute that it was an intended exercise of the police power.*

Mugler v. *Kansas*, 123 U.S. 623, at pages 660, 661:

"But by whom, or by what authority, is it to be determined whether the manufacture of particular articles of drink, either for general use or for the personal use of the maker, will injuriously affect the public? Power to determine such questions, so as to bind all, must exist somewhere; else society will be at the mercy of the few, who, regarding only their own appetites or passions, may be willing to imperil the peace and security of the many, provided only they are per-
*661 mitted to do as they *please. Under our system that power is lodged with the legislative branch of the government. It belongs to that department to exert what are known as the police powers of the State, and to determine, primarily, what measures are appropriate or needful for the protection of the public morals, the public health, or the public safety.

"It does not at all follow that every statute enacted *ostensibly* for the promotion of these ends, is to be accepted as a legitimate exertion of the police powers of the State. There are, of necessity, limits beyond which legislation cannot rightfully go. While every possible presumption is to be indulged in favor of the validity of a statute, *Sinking Fund Cases*, 99

> U.S. 700, 718, the courts must obey the Constitution rather than the law-making department of government, and must, upon their own responsibility, determine whether, in any particular case, these limits have been passed. 'To what purpose,' it was said in *Marbury* v. *Madison*, 1 Cranch, 137, 176, 'are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed are of equal obligation.' *The courts are not bound by mere forms, nor are they to be misled by mere pretences.* They are at liberty — indeed, are under a solemn duty — to look at the substance of things, whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority. If, therefore, a statute *purporting* to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a *palpable invasion of rights* secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution."

Note that the court here assumes that where a statute is really enacted to secure the objects within control of police power it will be enacted —

> "*ostensibly* for the promotion of these ends. . . . If, therefore, a statute *purporting* to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a *palpable invasion of rights* secured by the fundamental law, it is the duty of the

courts to so adjudge, and thereby give effect to the Constitution." (Ibid. 661.)

Obviously, the police power is frequently used as a conspicuous shield to protect the state against the limitations of the federal Constitution, and particularly of the Fourteenth Amendment and the contract clause of the Constitution.

It has remained to the present defendants and their counsel to set up a claim, in effect, that the state's most efficient weapon, the police power, has been wielded and concealed under the guise of an [alleged] voluntary sale.

We submit that if the legislature had intended to pass the statute of 1894 under the police power the statute would have contained the usual evidences of such intent, such, for example, as appeared in the legislation in —

Stein v. *Bienville Water Supply Co.*, 141 U.S. at pages 74, 75:

"The Bienville Water Supply Company was incorporated by an act approved February 19th, 1883, which was amended by an act approved February 14th, 1885. *The preamble recites that 'whereas the inhabitants* of the municipality known as the Port of Mobile, and the inhabitants of the village of Whistler, in the County of Mobile, *are not provided with an adequate supply of water for domestic and municipal purposes; and whereas, it is essential to the public health* of the citzens of those towns, *and to the protection of their property* and the public property therein, against conflagration, that an abundant supply of water should be introduced and furnished to said citizens; and whereas, a company of citizens of said county propose to undertake the duty of furnishing such supply to said towns for the public use and benefit.'"

If it be claimed here that the statute of 1894 was passed under the "police power" of the state, we answer further:

1. That the only fact giving any color to this claim is plaintiff's use of the Merrimac River water.

2. That it is admitted that the company used this water only from June, 1892, to some time in March, 1893. (R. 89, 90.)

The act of 1893 was approved June 10, 1893. (R. 40.)

The act of 1893 became void when the city voted *not* to purchase, August 25, 1893. (R. 5.)

There is no proof that the legislature of 1894 enacted the statute of 1894 because of the company's use of the Merrimac River water, which had been discontinued in *March, 1893*.

3. In any event, the act of 1894 cannot be construed as an act to prevent the improper use of the Merrimac River water. Our ground of complaint is that under the act the most valuable part of our property is taken without any compensation; and that cannot be constitutionally done, even as a punishment for a wrong.

So far as defendant seeks by these facts to justify any legislative attempt to punish the Water Company, they are incompetent, irrelevant, and immaterial; because the legislature has no constitutional power to punish the Water Company by compelling it to take less than full value for all its property. If the Company has done wrong in using the property, that wrong should be redressed in a *direct action therefor, and cannot be made a factor in condemnation proceedings.*

The above propositions are clearly and vigorously stated by BREWER, J., in *Ames* v. *Union Pacific Ry. Co.*, 64 Fed. Rep. 165.

What he says there concerning railroad companies obviously applies equally to water companies:

"Property invested in railroads is as much protected from public appropriation as any other. If taken for public uses, its value must be paid for. Constitutional guaranties, to this extent, are explicit; and in such condemnation proceedings no inquiry is permitted as to how the owners have acquired the property, provided only it be legally held by them. If a farm belong to an individual, and the public seeks to take it, it must pay its value, and is not permitted to diminish the price by proving the owner acquired the means of purchase by immoral or disreputable practices. He may have made his fortune dealing in shares, as a lobbyist, or in any other way obnoxious to public condemnation; but, if he has acquired a legal title to the property, he is protected in its possession, and cannot be disturbed until the receipt of its actual cash value. The same rule controls if railroad property is sought to be appropriated. No inquiry is open as to whether the owner has received *gifts from State* or individuals, *or whether he has, as owner, managed the property well or ill, or so as to acquire a large fortune therefrom. It is enough that he owns the property* — has the legal title — *and, so owning, he must be paid the actual value of the property.* **If he has done any wrong in acquiring or using the property that wrong must be redressed in a direct action therefor, and cannot be made a factor in condemnation proceedings.** These propositions in respect to condemnation proceedings are so well settled that no one ever questions them. *The same general ideas must enter into and control* LEGISLATION *of the kind before us.* The value of the property cannot be destroyed by *legislation depriving the owner of adequate compensation.*"

Ames v. *Union Pacific Ry. Co.*, 64 Fed. Rep. at page 175.

4. The absurdity of any claim that the Merrimac water episode had anything to do with the act of 1894 is shown by the fact that the legislature passed a similar act in reference to the City of Gloucester and the Gloucester Water Company.

See chapter 451 of acts of 1895, — particularly sec. 16.

See Appendix hereto, p. 30.

5. Obviously the injection of the Merrimac water episode into this case is for the purpose of accomplishing what is forbidden by law, namely, the examination of the *motives* actuating the law-making body, it being claimed, we anticipate, that this episode furnished one of the "reasons" for the legislation complained of. Such reason, we submit, is obviously merely a *motive*, especially as the legislation resulting is not in the line with legislation under the police power, where the objects to be accomplished are visibly and "ostensibly" the promotion of the public health, safety, etc. The legislation here complained of shows not a trace of intent to exercise the police power. The use of the Merrimac River ceased before the act of 1893 was passed, and there is no indication that its resumption was ever even threatened. The City had the power to stop it promptly by injunction even when it was used. The act of 1894 prescribed no regulations for the health or safety of the public or any part thereof; and if the Merrimac River matter had anything to do with the legislation, it furnished at most to some of the legislators a motive for punishing the Water Company by the compulsory sale in the act of 1894, under which it would be deprived of its most valuable rights without compensation. *Such motives cannot be shown or taken into consideration.*

"MOTIVES OF LEGISLATURE. — It is not within the province of the judiciary to inquire into the motives actuating the law-making body."

6 Amer. & Eng. Encyc. of Law (2d ed.) p. 1087, giving a long list of federal and state authorities containing (note 5), *inter alia*, —

Ex Parte McCardle, 7 Wall. 514.

Doyle v. *Continental Ins. Co.*, 94 U.S. 535.

The obvious fact is that such legislation is part of the new socialistic movement, whereby the attempt is being made to deprive corporations of some of their most valuable property without paying for it. The attempt to get property by governmental authority without paying for it is old, — so old that the provision against such attempts was inserted in *Magna Charta*, and thence was adopted in our federal and state Constitutions. But the present *form* of the attempt is novel; and is intended to accomplish the unlawful, unconstitutional end under such forms of law as may delude the courts.

See Gl. R. 17.

For summary and conclusion in both the Newburyport and Gloucester cases, see post, p. 272.

The Gloucester Case.

The statement of this case appears *ante*, pp. 20 *et seq.*

Jurisdiction.

The statement of jurisdictional facts appears *ante*, p. 20.

The Circuit Court had Jurisdiction.

The argument upon this point is similar to the argument in the Newburyport case upon the like point; q.v., *ante*, pp. 36 *et seq.*

The appeal was properly made directly from the Circuit Court to the Supreme Court; and was seasonably taken and entered. (See jurisdictional facts, *ante*, p. 20.)

The appeal was taken, entered, and docketed within two years — in fact within one year — from the date of the final decree in the Circuit Court.

That the appeal was properly made and seasonably taken and entered appears in the argument, *ante*, pp. 44 *et seq.*

Concerning Special Grounds Alleged by Defendant as Barring Plaintiff's Right to be Heard on the Merits.

These grounds are covered by those treated in the argument on the Newburyport case, *ante*, pp. 46 *et seq.*

Concerning the Alleged Violation of the Fourteenth Amendment.

General Statement of Plaintiff's Grievance Under the Provision of the Fourteenth Amendment Relating to "Due Process of Law."

Mutatis mutandis, our general statement here is the same as the general statement in the Newburyport case (*ante*, p. 2).

Plaintiff's grievance as to "due process of law" is, shortly stated, that, although the sale under chapter 451 of the Massachusetts acts of 1895* was *voluntary in form*, it was *compulsory in fact and in law;* that such compulsory sale constituted *in effect a taking* of plaintiff's property; that that statute, as construed by the Supreme Court of Massachusetts, provided for compensation for only *part* of the property taken; that the part for which no compensation whatever was provided consisted of certain franchise rights which were of the value of more than $900,000; that the taking of such part of our property without compensation was in violation of plaintiff's rights under the Fourteenth Amendment to the Constitution of the United States, as hereinafter shown.

Bearing in mind that there is no opinion in the Circuit Court in this case excepting the mere rescript of the court stating, "This case in our opinion is governed by the case of *The Newburyport Water Company* v. *The City of Newburyport*, and the demurrer to the bill is therefore sustained," (Gl. R. 89) — we call attention to the fact that, because this case was held to be so governed, the opinions in the Newburyport case are set forth as part of the record in the Gloucester case. (See Gl. R. 93, 98, 113.)

The Main Distinctions between the Newburyport and Gloucester Cases.

1. In the Gloucester case there was only one statute authorizing or purporting to authorize municipal competition, to wit, chapter 451 of the acts of 1895; while in the Newburyport case there were two, the act of 1893 and the act of 1894, and much complication and discussion resulted therefrom. The city of Newburyport claims that the act

* This is erroneously indexed in the record as page 40. It appears at page 48.

of 1893 went into effect notwithstanding the City's vote not to purchase, and that the City received its water franchise rights from the act of 1893; while the Newburyport Water Company claims that because of such vote the act of 1893 did not become effective, and that only under the act of 1894, including the act of 1893 as re-enacted by the act of 1894, did the City receive any water franchise rights, and that then it acquired the Water Company's franchises by the sale under the act of 1894. No such issue or dispute is possible in the Gloucester case, because the municipal competition and the sale or transfer were authorized in one and the same act; and it will therefore all the more readily appear that the City received the Water Company's franchise rights under the sale or transfer provided by the act.

2. There is no Merrimac River episode in the Gloucester case, nor anything else from which it could be inferred that there was any ground, reason, or motive in depriving the Water Company of its franchise rights without compensation, except the palpably mercenary motive that the municipality wished to get them for nothing.

3. From the very beginning of the Gloucester legislative contest the City showed its desire and intention to obtain, if possible, the property of the Gloucester Water Supply Company without paying for any of its franchise rights.

In 1893, instead of purchasing the property of the Company in accordance with the provisions of the act of 1881, and the contracts made thereunder, the City attempted to secure the passage of an act authorizing it to construct and operate competing water works and with no obligation to buy out the Water Company. In its petition to the legislature the City asked for authority to take by purchase or otherwise, the waters of *any* pond, stream, or well within the limits of the City; thus requesting, not only the means of competing with the Water Company, but of taking any or all of the Water Company's supply. (Gl. R. 5, 6, 31, 32.)

4. The record history of the Gloucester legislative contest shows a persistent attempt on the part of the City to procure legislation within the lines of the Greenwood case (which is discussed *ante*, p. 218), namely, to procure its franchise rights directly from the legislature and to purchase from the Water Company only the latter's physical property. This was, in effect, what was attempted above (3).

5. Failing in this, and after the Newburyport act of 1894 was passed, the City of Gloucester next tried to procure legislation which, though including a sale, should limit the purchase to the physical property and be free from the doubts in reference to the construction of the statute which were inevitable in the Newburyport case.

The City failed also in this. The act as passed differs materially from the act finally presented by the City; yet the bill finally offered in behalf of the City aids in the construction of the act as passed, — as will be shown in the argument herein.

We shall also show that this legislation makes the Gloucester case free from the tedious question in the Newburyport case as to whether or not the City received its water franchises from the state in an earlier act.

6. It will also appear from the record history of the act that the sale provided therein was intended by the legislature to include the Water Company's franchise rights and all its other property, including all its contracts.

7. Such history will also show that it furnished to the plaintiff ground for the hope and expectation that the state court would finally construe the statute as requiring payment for all the Company's property, including the franchise rights, and therefore furnish also ground for awaiting the final determination of the state court before bringing the present suit.

8. It will be shown that the commissioners and the single justice of the state court were both doubtful as to

the construction of the statute, the single justice reserving all questions thereon for the full court; and thus was furnished additional argument justifying the plaintiff in awaiting the decision of the full court.

9. The decision of the full court was rendered June 19, 1901 (Gl. R. 16), and plaintiff's bill herein was filed within a fortnight thereafter, to wit, July 1, 1901.

10. The *form* of the transfer in the Gloucester act tends to confirm our claim that the sale was obviously compulsory and was a taking by the state.

The transfer of title was to be made *without a deed!*

The Water Company had only to notify the mayor of the City in writing of its desire to sell its property to the City and file with the city clerk a specification and description thereof; and if the City voted to buy, then the transfer of title was made by the sovereign fiat of the state statute enacted for this case alone:

> "Said property shall thereupon become the property of said city." (Gl. R. 53.)

The state and City thus avoided compelling the Company to go through the farce and untruth of performing the universal legal requirement, viz., that a deed, to be recorded in Massachusetts, should contain the solemn acknowledgment that it was the vendor's *free* act and deed.

See Point VII., *post*, p. 253.

Our argument in the Gloucester case is by reference to the corresponding points in our argument upon the Newburyport case, with such additions and changes as are required and permitted by the distinctions between the two cases.

If the cases were identical, it would only be necessary to refer to our entire argument in the Newburyport case; but there are distinctions which we claim are of benefit to the plaintiff in each case; and, except where these dis-

tinctions occur, we beg to refer to the argument in the Newburyport case as constituting our argument upon similar points in the Gloucester case.

In our previous argument upon the Fourteenth Amendment the first five points are wholly points of law which we claim to be equally applicable to the Gloucester case; and therefore we beg to adopt by reference said points as our argument *pro tanto* in the Gloucester case. For convenience, we here repeat the headings of these five points, which are as follows: —

I.

"DUE PROCESS OF LAW," UNDER THE FOURTEENTH AMENDMENT, REQUIRES COMPENSATION TO BE MADE OR SECURED TO THE OWNER OF PRIVATE PROPERTY TAKEN UNDER THE AUTHORITY OF THE STATE FOR PUBLIC USE.

THIS PROVISION CONTROLS A TAKING, WHATEVER MAY BE ITS FORM OR GUISE. (*Ante*, p. 59.)

II.

AS TO WHAT CONSTITUTES A TAKING UNDER THE FOURTEENTH AMENDMENT.

WHATEVER THE PROVISIONS OF THE STATE STATUTE, WE ARE ENTITLED TO GO BEHIND THE FORM AND TO SHOW THAT WHAT WAS AUTHORIZED BY THE STATUTE AS CONSTRUED BY THE STATE COURT WAS, IN EFFECT OR IN SUBSTANCE, A TAKING OF PLAINTIFF'S PROPERTY WITHOUT COMPENSATION, UNDER THE FORM OR GUISE OF A SALE WHICH WAS APPARENTLY VOLUNTARY, BUT WHICH WAS IN REALITY COMPULSORY IN FACT AND IN LAW. (*Ante*, p. 62.)

III.

IT IS NOT ONLY SETTLED AS ABOVE SHOWN (II.) THAT THE OWNER OF PRIVATE PROPERTY MAY BE DEPRIVED OF IT BY STATE ACTION IN ANY FORM WHICH IS IN EFFECT OR IN SUBSTANCE A TAKING THEREOF; BUT —

IT IS ALSO SETTLED THAT A SALE WHICH IS COMPULSORY IN LAW UNDER A STATE STATUTE IS THE EQUIVALENT OF A TAKING BY THE STATE. (*Ante*, p. 67.)

IV.

IT RESULTS FROM THE THREE PRECEDING POINTS THAT DUE PROCESS OF LAW UNDER THE FOURTEENTH AMENDMENT REQUIRES COMPENSATION TO BE PAID OR SECURED TO THE OWNER OF PRIVATE PROPERTY SOLD TO A MUNICIPAL CORPORATION FOR PUBLIC USE BY A SALE WHICH, AS REGARDS SUCH OWNER, IS COMPULSORY IN LAW UNDER THE STATE STATUTE WHICH AUTHORIZES SUCH SALE. (*Ante*, p. 68.)

V.

AS TO WHAT CONSTITUTES LEGAL COMPULSION, AND ESPECIALLY COMPULSION BY A GOVERNMENT OR ITS OFFICERS; AND AS TO THE KIND OF COMPULSION WHICH CONSTITUTES DURESS, AND RENDERS INVOLUNTARY IN LAW (AS WELL AS IN FACT) WHAT APPEARS TO BE VOLUNTARY.

WHILE ORDINARILY WHAT MAY BE LAWFULLY DONE MAY BE LAWFULLY THREATENED, YET IF THE GOVERNMENT, OR AN OFFICER OF THE GOVERNMENT ACTING UNDER COLOR OF OFFICE, THREATENS AN INDIVIDUAL WITH SERIOUS LOSS, UNLESS THE INDIVIDUAL WILL MAKE A CONTRACT TO DO SOMETHING NOT REQUIRED BY LAW, AND IF THE CONTRACT IS MADE UNDER THE INFLUENCE OF SUCH THREAT, SUCH CONTRACT, THOUGH VOLUNTARY IN APPEARANCE, BECOMES THEREBY COMPULSORY IN FACT AND IN LAW AND IS OBTAINED BY DURESS. (*Ante*, pp. 68 *et seq.*)

In addition to the argument upon the similar point, *ante*, pp. 68, 72, we beg to note that a person may be punished heavily under the criminal laws of Massachusetts, who, in writing, threatens what, without threat, he could lawfully *do*, viz., cause the arrest of the guilty party.

The statute providing for such punishment is as follows:

Mass. Rev. Laws, c. 207, sec. 25:

"Section 25. Whoever, verbally or by a written or printed communication, maliciously threatens to accuse another of a crime or offence, or by such communication maliciously threatens an injury to the person or property of another, with intent thereby to extort money or any pecuniary advantage, or with intent to compel the person so threatened to do any act against his will, shall be punished by imprisonment in the state prison for not more than fifteen years, or in the house of correction for not more than ten years, or by a fine of not more than five thousand dollars, or by both such fine and imprisonment."

The corresponding section in the General Statutes of Massachusetts was section 28 of chapter 160, which was as follows: —

"Sect. 28. Whoever, either verbally or by a written or printed communication, maliciously threatens to accuse another of any crime or offence, or by such communication maliciously threatens an injury to the person or property of another, with intent thereby to extort money or any pecuniary advantage whatever, or with intent to compel the person so threatened to do any act against his will, shall be punished by imprisonment in the state prison not exceeding fifteen years, or in the house of correction not exceeding ten years, or by fine not exceeding five thousand dollars, or by such imprisonment and fine."

Under this statute it was held that the offence may be committed in an endeavor to obtain only that which is justly due to the defendant. See, —

Commonwealth v. *Coolidge*, 128 Mass. 55.

It is worth noting here that, whereas the defendant in its petition for rehearing in the Newburyport case (by which this case is "governed") complained that the Circuit Court did not allude to or appear to have considered the many citations made by defendant upon the questions of compulsion and duress (Newburyport R. pars. 4, 5, pp. 98, 99), the Circuit Court did not thereafter cite any of defendant's cases upon compulsion or duress.

The Circuit Court considers in its opinion the four cases of governmental compulsion cited by *plaintiff*.

> "In the Supreme Court cases *relied on by the plaintiff* it will be found that the compulsion or duress was based upon an illegal act or exaction, or threatened illegal act or exaction, by the Government or its officers."

The court then examines "the Supreme Court cases relied on by the plaintiff" as follows: —

> *United States* v. *Tingey*, 5 Pet. 115, 129. (R. 124.)
> *Maxwell* v. *Griswold*, 10 How. 242. (R. 125.)
> *Swift Co.* v. *United States*, 111 U.S. 22, 28. (R. 125.)
> *Robertson* v. *Frank Brothers Co.*, 132 U.S. 17. (R. 126.)

The Circuit Court then purports to deduce from them its rule upon the crucial point; yet we submit to the examination of the present court that *compulsion in law* as well as in fact *was held in all of them;* that *in none of them is there, either expressly or by implication, any such rule as the rule apparently deduced by the Circuit Court*, that what may be lawfully done may be lawfully threatened; and especially that **in the first of them, the Tingey case, the**

rule laid down by the Supreme Court of the United States is precisely in effect the rule as we have formulated it; to wit, —

> As to what constitutes legal compulsion, and especially compulsion by a government or its officers; and as to the kind of compulsion which constitutes duress, and renders involuntary in law (as well as in fact) what appears to be voluntary.
>
> While, **ordinarily,** what may be lawfully done may be lawfully threatened, yet if the government, or an officer of the government acting under color of office, threatens an individual with serious loss, unless the individual will make a contract to do something not required by law, and if the contract is made under the influence of such threat, such contract, though voluntary in appearance, becomes thereby compulsory in fact and in law, and is obtained by **duress.** (See Point V., *ante*, pp. 68 *et seq.*)

We submit, therefore, that in the Newburyport case, and even more clearly in the Gloucester case, the general rule as thus qualified was *ignored* by the Circuit Court in these two cases; that, as we have shown, the rule laid down in the Tingey case was expressly adopted by the Supreme Court of Massachusetts more than a generation ago (*ante*, p. 81), and is to-day the rule of both the federal courts and the courts of Massachusetts (*ante*, pp. 81–82); and that the plaintiffs in these two cases are entitled to the full benefit and application of it here.

VI.

Application of the foregoing principles of law to the present case.

A.

The government, that is, in this case, the commonwealth of Massachusetts, by the act of 1895

(c. 451), IN EFFECT THREATENED THE PLAINTIFF WITH SERIOUS LOSS UNLESS THE PLAINTIFF WOULD BY AN APPARENTLY VOLUNTARY SALE AND CONTRACT DO SOMETHING NOT REQUIRED BY LAW.

B.

THE PLAINTIFF, UNDER THE INFLUENCE OF SUCH THREAT, DID WHAT WAS REQUIRED AS ABOVE; TO WIT, MADE THE APPARENTLY VOLUNTARY SALE PROVIDED FOR IN THE ACT OF 1895, WHICH SALE INCLUDED THE DISPUTED FRANCHISE RIGHTS FOR WHICH PLAINTIFF RECEIVES NO COMPENSATION.

C.

THE SALE BECAME THEREBY COMPULSORY IN LAW.

See particularly Point VI. in the Newburyport case, *ante*, pp. 85 *et seq.*, with the corresponding subdivisions.

The above Point VI. is treated with the following subdivisions: —

A.

That the government, that is, in this case, the commonwealth of Massachusetts, by the act of 1895 (c. 451), in effect threatened the plaintiff with serious loss unless the plaintiff would by an apparently voluntary sale and contract do something not required by law. (See *ante*, p. 86.)

We are entitled to show the substance and effect of the statute, and also its purpose, but not the motives of the legislature. (See *ante*, p. 86.)

"The courts are not bound by mere forms, nor are they to be misled by mere pretences. They are at liberty — indeed, are under a solemn duty — to look

at the substance of things, whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority." (See *ante*, p. 88.)

It is likewise true that questions of duress are to be determined not merely upon the form of the language used, but upon what was said or done IN EFFECT. (See *ante*, p. 89.)

1. The municipal competition authorized by the statute meant serious loss to the plaintiff company, to wit, its inevitable damage and ruin.

See particularly *ante*, p. 89.

It is also to be noted that in the Gloucester case the following facts were alleged in the bill and *admitted by the demurrer*; viz., —

"*the loss and ruin which would inevitably result from such municipal competition* authorized under said chapter," etc. (Gl. R. 17.)

2. The statute (1895, c. 451) provided that the sale from the Water Company to the City should comprise, inter alia, the Water Company's following franchise rights: —

The franchise right to take additional sources of supply in ward 8 in said city;

The franchise right to lay and maintain pipes in the streets of said city;

The franchise right to charge water rates for water supplied to said city and its inhabitants. (Gl. R. 11.)

Such franchise rights were the PROPERTY of the Water Company.

It is not denied (as we understand it) that the terms of the statute, both naturally and technically, would includ-

what plaintiff claims above; and the claims which the City of Newburyport made upon the corresponding point (*ante*, p. 93) would be obviously untenable if made here.

Those claims were that the statute cannot be construed to include franchise rights in the sale, —

(*a*) Because the Supreme Court of the state adopted the contrary construction, which is binding upon the Supreme Court of the United States.

(*b*) Because the city received a complete water franchise by the act of 1893, and was in possession of it thereunder when the act of 1894 was passed.

(*a*) As to the possible claim that the Supreme Court of the state construed the Gloucester act as not including the franchise rights in the sale, we submit that in the Gloucester case there is nothing in the opinion of the state court tending to sustain such claim.

The full court sustained the award of the commissioners except as to some relatively small points not involved herein. (Gl. R. 87.)

The commissioners expressly excluded from valuation "the franchise rights" and gave as the reason for so doing, — not that they did not pass under the statute, — but simply that, whatever property was included in the sale was "property which the Company can no longer use, but the city can, and is to pay a fair value upon these conditions," namely, that the "value shall be estimated without enhancement on account of future earning capacity, of future goodwill, or on account of the franchise of said Company." (Gl. R. 13.)

In considering the same question the full court simply treats the franchise rights as not to be paid for, but makes no suggestion that they were not included in the sale.

The obvious reason for this omission is that the language of the act at this point is so plain as to interpret itself; that ALL *property, rights, and privileges* of the Water Com-

pany were included in the sale, and that the city was not to proceed to exercise any water rights "unless it shall have *first* purchased from said Company the property aforesaid."

(*b*) As to (*b*), — that the City of Newburyport received a complete water franchise by the act of 1893 and was in possession of it thereunder when the act of 1894 was passed.

Obviously, no such point can be made in the Gloucester case, because the only act relating to municipal competition and to the sale complained of was the act of 1895, which provided both for municipal competition and for the sale by which the effect of such competition could be avoided.

Moreover, the record history of the Gloucester legislative contest adds greatly to the strength of our contention that the statute should be construed as including the Water Company's franchise rights in the sale.

For in 1894 the City renewed the attack in the legislature, and offered a bill accompanying the petition of the mayor of Gloucester. (Gl. R. 37.) Although in this bill it limited the power to take waters to those not heretofore taken or purchased by the Gloucester Water Supply Company within the limits of said City, the bill was not favorably acted upon by the legislative committee (Gl. R. 8); and another bill was drawn and substituted in the legislature at the instance of said City by its duly authorized agent or agents. (Gl. R. 8.) The latter bill appears Gl. R. 43. Section 16 provides for a sale (Gl. R. 47), and *it should be noted that the enumeration of what is to pass by the sale expressly excludes all such general words as rights, privileges, or franchises, and includes only such terms as would clearly limit the purchase to the physical plant of a water company.* Not content with this limitation, the bill also expressly provided that "said commissioners in determining the value of said property *shall*

not take into account the franchise of said company, the value of the City of Gloucester and its inhabitants as a market for the sale of water, nor the income theretofore earned by said Company, nor the earning capacity of said property, but shall only ascertain the fair value for use by said City of the specific property hereinbefore named which shall have been conveyed as aforesaid." (Gl. R. 47, 48.) If the bill had been enacted in that form it would probably have been idle to contend that the franchise rights of the Water Company passed by any sale under the act.

But the bill as enacted changed the enumeration which in the act complained of *begins with precisely the general terms which the framers of the bill in behalf of the City were careful to exclude from the act.*

Extract from the bill substituted at the instance of the City. (Gl. R. 47.)

"*Section 16.* At any time within thirty days after this act shall have been accepted by the City of Gloucester, as hereinafter provided, the Gloucester Water Company may notify the mayor of Gloucester in writing that it desires to sell to said city its lands, easements, waters, water rights, reservoirs, pipes, hydrants, tools and all apparatus used in supplying the inhabitants of Gloucester with water, and execute and deliver to said city

Extract from chapter 451 of the acts of 1895, Section 16. (Gl. R. 53.)

"*Section 16.* If within thirty days after this act shall have been accepted by the City of Gloucester, as hereinafter provided, the Gloucester Water Supply Company shall notify the mayor of the city of Gloucester in writing that it desires *to sell to said city* [*all the corporate property* and *all the rights, privileges,**] easements, lands, waters, water rights, dams, reservoirs, pipes, engines, boilers, machinery, fixtures,

[*The terms which we have placed in the brackets do not appear in the bill.]

proper deeds and instruments, in writing, conveying to said city the property aforesaid, whereupon the property thus conveyed shall become the property of the city of Gloucester." . . .

hydrants, tools and all appliances owned by said company, and used in supplying said city and the inhabitants thereof with water, and shall file with the city clerk of said city a specification and description thereof, *said city shall not proceed to supply water to itself or its inhabitants under the authority of this act, unless it shall have* FIRST *purchased of said company the property aforesaid;* and said company is authorized to make sale of said *property* to said city, and said city is authorized to purchase the same and manage and use the property thus conveyed for the purposes and under the provisions of this act." . . .

Since, therefore, the legislature had before it a bill limiting the sale to the physical plant of the Water Company, but added to such description of what was to be sold the terms "all the corporate property and all the rights, privileges," we submit it is obvious without argument that such sale was intended by the legislature to include the Water Company's franchise rights and all its other property, including all its contracts.

This contention is not weakened by a reference to any other part of the act. On the contrary, such reference strengthens it, because it is provided that, under the con-

ditions named, "said city shall not proceed to supply water to itself or its inhabitants, under the authority of this act, unless it shall have *first* purchased of said Company the property aforesaid; and said Company is authorized to make sale of *said* property to said City, and said City is authorized to purchase the *same*."

These rights of the Company were franchises, and were thus the property of the Water Company.

Boston &c. v. *Salem &c.*, 2 Gray, at page 35, and cases cited.

See also —

Williston Seminary v. *County Commissioners*, 147 Mass. at page 430.

Monongahela Navigation Co. v. *United States*, 148 U.S. at pages 327, 328.

Wherefore we submit we have shown that the statute (1895, c. 451) provided that the sale from the Water Company to the City should comprise, inter alia, the Water Company's following franchise rights: —

The franchise right to take additional sources of supply in ward 8 in said City;

The franchise right to lay and maintain pipes in the streets of said City;

The franchise right to charge water rates for water supplied to said City and its inhabitants. (Gl. R. 11.)

Such franchise rights were the PROPERTY *of the Water Company.*

3. The sale provided by the statute included something not required by law; that is, it included franchise rights belonging to the Company, which, under the terms of the sale, though included therein, were not to be paid for. Such a sale could not be required by law.

We have shown in the preceding subdivision 2 that, under the statute, the sale included the Company's franchise rights.

No compensation was made or secured by the statute to the Water Company for a valuable part of the property included in the sale, viz., the Company's said franchise rights.

The commissioners reported, —

> "We have not considered the past, present or prospective income, good will, or the franchise rights." (Gl. R. 13.)

The Water Company had claimed that the value of the franchise rights was, in fact, covered by and included in the value and amount of the earnings and income of the plaintiff Company. (Gl. R. 11, 12.)

The full court sustained the commissioners in excluding these franchise rights, covered in fact by income as aforesaid, from valuation. (Gl. R. 87.)

Wherefore it results that no compensation was made or secured by the statute to the Water Company for a valuable part of the property included in the sale, viz., the Company's said franchise rights.

In short, the statute provided that the Water Company should sell and convey its franchise rights to the City without receiving any compensation therefor.

That there is and can be no law requiring the Company to do this goes without saying.

On the contrary, *the right to just compensation for private property is at the very foundation of our jurisprudence;* and the sacredness of this right has caused the United States Supreme Court to read into, and make part of the phrase "due process of law" in the Fourteenth Amendment, the provision requiring compensation for private property taken for public use. (See *ante*, Point I.)

Wherefore we submit it is established that the sale provided by the statute included something not required by law; that is, it included franchise rights belonging to the Company which under the terms of the sale, though included therein, were not to be paid for. Such a sale could not be required by law.

Summary of the Foregoing.

We have shown that we are entitled to go behind the form of the statute, and to show what it was in substance and effect.

We have shown that questions of duress are likewise to be determined, not merely upon the form of the language used, but upon what was said or done *in effect*.

In order, then, to show what the statute was in effect, we have shown further as follows: —

1. The municipal competition authorized by the statute meant serious loss to the Company, to wit, its inevitable damage and ruin.

2. The statute (1895, c. 451) provided that the sale from the Water Company to the city should comprise, *inter alia*, the Water Company's following franchise rights: —

> The franchise right to take additional sources of supply in ward 8 in said City.
>
> The franchise right to lay and maintain pipes in the streets of said City.
>
> The franchise right to charge water rates for water supplied to said City and its inhabitants. (Gl. R. 11.)

Such franchise rights were the *property* of the Water Company.

3. The sale provided by the statute included something not required by law; that is, it included franchise rights belonging to the Company which, under the terms of the sale, though included therein, were not to be paid for.

Such a sale could not be required by law.

Wherefore we submit that the authorization in the statute of municipal competition conditioned upon the Company's making such sale, which could not be required by law, was in effect that the government, the Commonwealth of Massachusetts, by the act of 1895, threatened the plaintiff with serious loss unless the plaintiff would, by an apparently voluntary sale and contract, do something not required by law, — different from that required by law.

That such statutory declaration of impending loss or ruin may be properly termed a threat, is indicated by the opinions of both the Massachusetts Court and the Circuit Court referred to.

See quotation *ante*, p. 111, where it also appears that the Circuit Court's reasoning is a holding, in effect, that the authorization of municipal competition was a threat.

Duress by Submission to "Choice of Evils."

Moreover, under the decisions of the present court, duress may be caused by a declaration of a probable or a certain evil to come, giving to the party threatened a *choice of evils*.

A submission "merely as a choice of evils" was held, in —

Robertson v. *Frank Brothers Co.*, 132 U.S. 17, at page 22, —

not to destroy the involuntary character of the act.

Coercion is intensified when the greater evil is that unless the party submits he must "discontinue the business," which is certainly the case where the corporation will inevitably be ruined. (Ibid. p. 23.)

B.

The plaintiff made the sale under the influence of such threat.

This is alleged as a fact in the bill, and is admitted by the demurrer.

The allegation is as follows: —

> "19. Plaintiff further says that . . . such sale and transfer and the said acts of the plaintiff, — its officers, agents and stockholders, in reference thereto, were influenced and compelled by said threat." (Gl. R. 17.)

C.

The sale became thereby compulsory in law.

For we submit it is established under Point V., —

While *ordinarily* what may be lawfully done may be lawfully threatened, yet if the government, or an officer of the government, acting under color of office, threatens an individual with serious loss, unless the individual will make a contract to do something not required by law, and if the contract is made under the influence of such threat, such contract, though voluntary in appearance, becomes thereby compulsory in fact and in law, and is obtained by duress.

Conclusion of this Point.

And we submit that under the present point we have established all the above essentials of legal compulsion or duress, to wit: —

A.

The government, that is, in this case, the Commonwealth of Massachusetts, by the act of 1895 (c. 451), in effect threatened the plaintiff with serious loss unless the plaintiff would by an apparently voluntary sale and contract do something not required by law.

B.

The plaintiff, under the influence of such threat, did what was required as above, to wit, made the apparently voluntary sale provided for in the act of 1895, which sale included the franchise rights for which plaintiff receives no compensation.

We submit it follows, as a necessary conclusion, that—

C.

The sale became thereby compulsory in law.

We submit it likewise follows that we have established and sustained the third, fourth, and fifth assignments of error.

"III.

The court erred in this:

That, although it held that the sale of the Company's property was compulsory in fact, it held that such sale was not compulsory in law.

IV.

The court erred in this:

That it did not hold that the act of 1895, being chapter 451 of the Massachusetts Acts of 1895, was compulsory in law as well as in fact, and constituted duress.

V.

The court erred in this:

That it held, in effect, that the threatened grant to the defendant, The City of Gloucester, of the competing franchise under said act of 1895 (being chapter 451 of Massachusetts Acts of 1895) was a lawful exercise of legislative power." (Gl. R. 115.)

Anticipated Defences to the Foregoing.

For reply to these, and examination of cases heretofore cited by defendant upon duress, in anticipation that the same cases may be cited, — see *ante*, pp. 115 *et seq.*

The state court's opinion that "the sale to the City was not obligatory on the Water Company;" with the subsidiary statements that "the franchise of the Gloucester Water Supply Company was not an exclusive franchise;" and that "the Company was given the option of selling its property to the City" — is not binding upon the present court, which, according to its own decisions, must construe the statute for itself.

Opinion of LORING, J., Gl. R. 85.

For it is to be remembered that in the proceeding then before the state court the Water Company had no right to raise the issue whether the statute was unconstitutional or not, or whether for any reason it was valid or not. The court and the plaintiff were both bound to assume, *in that proceeding*, that the act was valid and constitutional.

See —

Pitkin v. *Springfield*, 112 Mass. 509, at page 511.

Moore v. *Sanford*, 151 Mass. 285, at page 287.

And yet under *Moore* v. *Sanford*, *ubi supra*, the plaintiff had and has the right to question the constitutionality in another proceeding such as the present; and that right carries with it the right to try the questions material thereto, which "by necessary inference" (151 Mass. 287) plaintiff was obliged to admit in the proceedings under the statute. Under these circumstances, obviously, the opinion of the state court upon the above quoted points which plaintiff could not there contest is not binding in the present proceeding. See —

Carroll v. *Lessee of Carroll*, 16 How. 275, at pages 286, 287.
St. Louis R.R. v. *Terre Haute R.R.*, 145 U.S. 393, at pages 403, 404.
Pollock v. *Farmers Loan & Trust Co.*, 157 U.S. 429, at page 575.

VII.

THAT THE COMPANY FILED WITH THE CITY CLERK OF SAID CITY "A SPECIFICATION AND DESCRIPTION" OF THE PROPERTY COMPRISED IN THE SALE IS IMMATERIAL. THE SALE REMAINS COMPULSORY IN FACT AND IN LAW.

Our corresponding point under the Newburyport case was as follows: —

That the Company gave a deed which was voluntary in form is immaterial.

The sale remains compulsory in fact and in law.

See Point VII., *ante*, p. 119.

For authorities in support of this point, see *ante*, pp. 119 *et seq.*; and we submit that those authorities are applicable, *à fortiori*, to the Gloucester case.

Moreover, it is important to note that the *form* of the transfer in the Gloucester act tends to confirm our claim that the sale was obviously compulsory and was a taking by the state.

In the Newburyport act (c. 474 of 1894) it was provided that the sale should be accompanied and evidenced by a deed, — which is the universal way in which a voluntary sale of real estate is carried out, — the statute expressly providing that "said Company shall, within twenty days after the vote aforesaid, execute and deliver to said City such proper *deeds* and instruments in writing, conveying to said City the property aforesaid, and said property thus conveyed shall thereupon become the property of said City." (R. 87.)

But in the Gloucester act, although terms of *sale* are used, the transfer was to be made by operation of the statute alone, and **without a deed.**

The Gloucester Water Supply Company was required merely to notify the mayor of Gloucester in writing that it, the Water Company, desired to sell to said City (Gl. R. 53); and, instead of carrying out such sale by deed, all else that the Water Company was required to do was to "file with the city clerk of said city a *specification and description thereof;*" that is, of all the corporate property and all the rights, privileges, etc.

In short, *all the Water Company was required to do was to make it* **appear** *that it was willing to sell all its property, and to furnish for record a complete specification of all its property;* and the state of Massachusetts, by virtue of its sovereign power, declared that, in this specific case, **without any deed whatever,** all the Water Company's corporate property, rights, privileges, etc., *should thereupon be vested in the City.*

We claim that, in *substance* and *effect*, the transaction was a taking by the state, and we submit that **even in FORM** it was more nearly a taking than a sale. For **it omitted the absolute universal requisite of a private voluntary sale, to wit, a DEED conveying the Company's real estate.**

This is all the more significant when we realize that the City would need a record title to the real estate, and that

Under the laws of Massachusetts no deed can be recorded unless it contains a solemn acknowledgment before a justice of the peace or other magistrate that it was the **free** *act and deed of the grantor.*

Pub. Sts. of Mass. c. 120, secs. 5, 6:

"Sect. 5. *No deed shall be recorded* unless there is indorsed upon or annexed to it a certificate, made as hereinafter provided, of its acknowledgment or of the proof of its due execution, and such certificate shall

be recorded at length with the deed to which it relates; but this section shall not apply to conveyances from the United States.

"Sect. 6. The acknowledgment of a deed shall be by the grantors or one of them, or by the attorney executing the deed, and, if made in this commonwealth, shall be made before a justice of the peace or notary public; if in any other portion of the United States, before a justice of the peace, notary public, magistrate, or commissioner appointed for the purpose by the governor of this commonwealth; and, if in a foreign country, before such a justice, notary, magistrate, or commissioner, or before a minister or consul of the United States or a consular officer of the United States accredited to such country; and the officer before whom an acknowledgment is made shall indorse a certificate of such acknowledgment upon the deed, or annex the same thereto."

Moreover, it is worth noting that in 1894 the legislature of Massachusetts had passed —

"An Act to establish a law uniform with the laws of other States for the acknowledgment and execution of written instruments."

Chapter 253 of the acts of 1894.

So far as deeds of corporations are concerned, the provisions of this act are as follows: —

"*Be it enacted, etc., as follows:*

"SECTION 1. Either the forms of acknowledgment now in use in this state, or the following, may be used in the case of conveyances or other written instruments, whenever such acknowledgment is required or authorized by law for any purpose; . . . 3. In the case of corporations or joint stock associations: On this

day of 18 , before me appeared A B, to me personally known, who, being by me duly sworn (or affirmed), did say that he is the president (or other officer or agent of the corporation or association) of (describing the corporation or association), and that the seal affixed to said instrument is the corporate seal of said corporation (or association), and that said instrument was signed and sealed in behalf of said corporation (or association) by authority of its board of directors (or trustees), and said A B acknowledged said instrument to be *the* **free** *act and deed of said corporation* (or association). (In case the corporation or association has no corporate seal, omit the words 'the seal affixed to said instrument is the corporate seal of said corporation (or association), and that,' and add, at the end of the affidavit clause, the words 'and that said corporation (or association) has no corporate seal.') (In all cases add signature and title of the officer taking the acknowledgment.)"

That the gist of every acknowledgment of a deed in Massachusetts has been and is an acknowledgment that the deed is the "**free** *act and deed*" of the grantor, is, we submit, known or knowable to the court as a matter of judicial notice, and as such can be verified from Crocker's Notes on Common Forms, first, second, third, and fourth editions.

We submit to the court that it is a fair inference that the legislature in 1895 had knowledge of the litigation then going on between the Newburyport Water Company and the City of Newburyport, and intentionally refrained from requiring of the Gloucester Water Supply Company, or any of its officers, the farcical and obviously untrue acknowledgment before a magistrate that a deed under such sale was the **free** act and deed of the Company.

VIII.

THE SALE, WHICH WAS COMPULSORY IN LAW, WAS FOR A PUBLIC USE OF THE PROPERTY.

That the sale was for such use is not disputed, and it is likewise settled law.

See Point VIII. under Newburyport case, *ante*, p. 120.

IX.

BY SUCH COMPULSORY SALE PLAINTIFF'S PROPERTY WAS TAKEN.

See Point IX. under Newburyport case, *ante*, p. 121.

We submit that this point is strengthened and confirmed by the peculiar provision in the Gloucester statute TRANSFERRING TITLE WITHOUT A DEED.

See Point VII. of this (Gloucester) case, *ante*, p. 253.

X.

THE PROPERTY OF PLAINTIFF WAS TAKEN UNDER COLOR OF THE AUTHORITY OF THE STATE OR COMMONWEALTH OF MASSACHUSETTS.

See Point X. under Newburyport case, *ante*, p. 124.

XI.

THE PLAINTIFF, A PRIVATE CORPORATION, IS A "PERSON" WITHIN THE FOURTEENTH AMENDMENT.

See Point XI. under Newburyport case, *ante*, p. 128.

XII.

IT RESULTS FROM THE PRECEDING POINTS THAT THE PLAINTIFF HAS BEEN DEPRIVED OF ITS PROPERTY BY THE STATE OR COMMONWEALTH OF MASSACHUSETTS WITHOUT DUE PROCESS OF LAW.

THE ERROR SPECIFIED IN THE FIRST ASSIGNMENT OF ERROR (*post*, p. 259) IS THEREFORE SHOWN; AND THE DECREE OF THE CIRCUIT COURT SHOULD BE REVERSED.

1. The sale involved in the present suit, though voluntary in form, as provided by the act of 1895, was *compulsory in law*. (See *ante*, Points I.–VI.), this conclusion being reached in subdivision C of Point VI. *ante*, p. 250.)

2. The compulsory sale was for a *public use* of the property. (See *ante*, Point VIII. p. 257.)

3. By such compulsory sale plaintiff's property was *taken*. (See *ante*, Point IX. p. 257.)

4. The property was taken under color of the authority of the state or commonwealth of Massachusetts under said act of the legislature of Massachusetts of 1895. (See *ante*, Point X. p. 257.)

5. The taking is without just compensation, to wit, is without ANY compensation. (See *ante*, Point VI. A, 3, p. 246.)

6. Under the Fourteenth Amendment "due process of law" requires compensation to be made or secured to the owner of private property taken for public use. See *ante*, Point I. p. 235.)

7. The plaintiff corporation is a "person" under the Fourteenth Amendment. (See *ante*, Point XI. p. 257.)

8. And finally, these constitute all the essentials required to establish our claim that the provisions of the act of 1895 relating to the sale and conveyance of the Water Company's rights (*a*) to take additional sources of supply in ward 8 in the city of Gloucester; (*b*) to lay and maintain pipes in the streets of said city; and (*c*) to charge water rates for water supplied to said city and its inhabitants, are in violation of the Fourteenth Amendment. (See *ante*, Points I.–IV. pp. 235–236.)

We submit it likewise follows that we have established

and sustained the first, second, and sixth assignments of error: —

"I. The court erred in this: That it held that the plaintiff has not been deprived of its property without due process of law in violation of the fourteenth amendment to the Constitution of the United States.

"II. The court erred in this: That it held that the plaintiff failed to establish a taking of its property without just compensation under the authority of the state.

"VI. The court erred in this: That it did not hold that by said act of 1895 (c. 451 of Massachusetts Acts of 1895), as construed and applied as alleged in plaintiff's bill in this suit, the State or Commonwealth of Massachusetts deprived and deprives plaintiff of its property without due process of law, in violation of the fourteenth amendment to the Constitution of the United States and of plaintiff's rights thereunder. (Gl. R. 115.)

XIII.

THE PROVISIONS OF THE ACT OF 1895 CONSTITUTE AN "ENTIRETY."

THE PART OF THE ACT WHICH WE HAVE SHOWN TO BE UNCONSTITUTIONAL CANNOT BE SEPARATED FROM THE REMAINDER WITHOUT VIOLATING THE OBVIOUS INTENT OF THE STATUTE.

THE ENTIRE ACT IS THEREFORE UNCONSTITUTIONAL AND VOID.

Upon this point we beg to rely upon the authorities and argument under similar Point XIII. in the Newburyport case (*ante*, p. 130).

XIV.

AS TO DEFENDANT'S CLAIM OF LACHES.

Mutatis mutandis, we submit that our argument under similar Point XIV. in the Newburyport case (*ante*, p. 134) covers and meets defendant's claim of laches.

If, however, defendant should claim that the prior decision of the state court in the Newburyport case required the Gloucester Company to proceed to test the constitutionality of the act of 1895, without waiting for the final decision of the state court, we answer that the peculiar features in the history of the Gloucester legislation furnished to the plaintiff ground for the hope and expectation that the state court would finally construe the statute as requiring payment for all the Company's property, including the franchise rights, and therefore furnished also ground for awaiting the final determination of the state court before bringing the present suit.

For we have shown above, —

First. That municipal competition was authorized *in the same act which provided for the sale*, thus preventing the possibility of the city's claiming, as in the Newburyport case, that the municipal competition was authorized in an act which preceded the act authorizing the sale.

Second. We have further shown that the legislature had before it a bill limiting the sale to the physical plant of the Water Company, and that the legislature prefixed to the City's enumeration of what the Water Company should sell to said City the terms, "*all* the *corporate property* and *all the rights, privileges*," etc., as shown above in Point VI., A, 2, of this (Gloucester) case. (*Ante*, pp. 243-245.)

The statute thus in terms provided that all the corporate property, and all its rights and privileges, should be included in the sale; and, being free from the possibility of claim that the city had previously acquired the franchise rights from the state, it presented to the state court *a different and stronger case than the Newburyport for claiming that all the Company's property should be paid for under the statute.* Moreover, the Newburyport case was the first upon the subject, and the decision in that single case could not therefore be regarded by the next litigant as settled law.

Plaintiff's bill contains the following allegations: —

"21. Plaintiff *further avers upon information and belief*

(*a*) That the said act of 1895 (chap. 451) was *novel;* that *the only act at all resembling* it in the terms of the so-called 'sale' was the Massachusetts act of *1894* (chap. 474) the effect and constitutionality of which are still in litigation. —

(*b*) That it is the policy and practice of the Federal courts not to pass upon the constitutionality of statutes while there remains an opportunity for the adoption of such construction of the statute involved as would avoid the point or points upon which such constitutionality is questioned. —[1]

(*c*) That it was open to said full court to hold, as claimed before it by said company that said company was entitled under said act of 1895 (chap. 451) to compensation from said City for all its, the said company's property except its franchise to be a corporation, and thereby to obviate all questions of constitutionality raised and sought to be raised in, by and under this bill. —

(*d*) That it was not open to the plaintiff company to contend before said commissioners and before said full court that said legislation was unconstitutional; —[2]

(*e*) That by proceeding as aforesaid before said commissioners and said full court plaintiff did not waive its right to contend in the proper court or courts that said legislation violated plaintiff's constitutional rights,[3] but on the contrary, plaintiff says that it has always claimed that if said act of 1895 (chap. 451)

[1] Point XIV. Newburyport case, *ante*, p. 138.

[2] Point XIV. Newburyport case, *ante*, pp. 139, 140. *Pitkin* v. *Springfield*, 112 Mass. 509, 511.

[3] Point XIV. Newburyport case, *ante*, p. 140. *Moore* v. *Sanford*, 151 Mass. 285, 287.

should be construed and applied as it has been by said commissioners and by said full court, (as hereinbefore alleged, par. 17 and par. 18) the said act is unconstitutional and void.

(*f*) That no decree or judgment has yet been entered upon the said award; and no payment thereunder has been made or tendered to plaintiff."

Gl. R. 17, 18.

So far as the above allegations are allegations of fact, they are admitted by the demurrer.

So far as they are allegations of law, they are established by the decisions hereinbefore cited.

The action of the Commissioners and of the Single Justice of the State Court.

The commissioners specially reported their construction of the act.

That the Gloucester Company was justified in deferring the bringing of the present bill until after the decision of the final state court is further shown by the fact that the same commissioners who had acted in the Newburyport case, while following generally the decision in the Newburyport case (Gl. R. p. 12), felt so doubtful about the valuation of the franchises, as represented by the income in the Gloucester case, that they specially reported the question and said that if they were wrong the question of valuation should be reconsidered. (Gl. R. 14.)

From the commissioners the case went to a single justice of the Supreme Court, who did not decide the question of valuation as he would have done had it been free from doubt, but reserved it and other questions for the full court. (Gl. R. 16.)

The single justice reserved the construction for the full court.

Wherefore we submit it is obvious that the Gloucester Company was justified in awaiting the decision of the full court before bringing the present bill. If that court had construed the statute as entitling the plaintiff to full compensation for all its property, then, although the sale was compulsory in fact and in law, and constituted a taking, yet as such taking, under the authority of the state, would have been for public purposes and would have provided for full, that is, just, compensation, the compulsory sale or taking would have been constitutional.

The decision of the full court was rendered June 19, 1901 (Gl. R. 16), and plaintiff's bill herein was filed *within a fortnight* thereafter, to wit, July 1, 1901. (Gl. R. 1.)

XV.

THE SPECIFIC RELIEF WHICH MAY BE FINALLY GRANTED NEED NOT BE DETERMINED NOW. IT IS SUFFICIENT AT PRESENT TO SHOW THAT WE MAY BE ENTITLED TO ANY FINAL RELIEF IN RESPECT OF THE PROPERTY IN ISSUE. WE HAVE SHOWN THAT THE ENTIRE ACT OF 1895 IS UNCONSTITUTIONAL; THAT ALL ACTION THEREUNDER IS VOID. THE ENTIRE COMPULSORY SALE THEREUNDER WAS VOID. AND UNDER THE PRINCIPLES OF EQUITY WE ARE ENTITLED AT LEAST TO A RESTORATION OF THE PROPERTY AND A DECREE IN EQUITY WHICH SHALL REMOVE THE CLOUD UPON PLAINTIFF'S TITLE ARISING FROM FILING SUCH "SPECIFICATION" WHICH MIGHT BE HELD, BY FORCE OF THE PECULIAR PROVISIONS OF THE ACT OF 1895, TO BE TANTAMOUNT TO A DEED.

See corresponding Point XV. in the Newburyport case, *ante*, p. 140.

"Praying general relief is sufficient."

Story's Eq. Pl. (10th ed.) sec. 41, and note 1, p. 38.

As the decision of the Circuit Court in this case was upon the demurrer, we beg to submit also the following: —

Law Relating to Demurrer.

1. *If any part of the bill is good, and entitles the plaintiff to relief, the demurrer should not be sustained in whole or in part; but should be wholly overruled.*

It will be seen upon inspection of the demurrer (Gl. R. 87–88) that, although the defendant assigns several grounds of demurrer, yet each and every ground is assigned as a demurrer to *the entire bill*.

> "If any part of a bill in equity is good, and entitles the complainant to relief or discovery, a demurrer to the whole bill cannot be sustained."
>
> *Livingston* v. *Story*, 9 Pet. 632, 658.

> "It is an established and universal rule of pleading in chancery, that a defendant may meet a complainant's bill by several modes of defence. He may demur, answer and plead to different *parts* of a bill. . . . But if he demurs to the whole bill, the demurrer must be overruled."
>
> Ibid. at page 658.

> "*The principle of equity pleading is universal, that a general demurrer to the whole bill must be overruled if any independent part of the bill is sufficient.*"
>
> *Atwill* v. *Ferrett*, 2 Blatch. 39, 48.

> "The demurrers in this case are to the whole bill. *If any part of the bill is good the demurrers fail.*"
>
> From opinion of BLATCHFORD, J., *Pacific R. R. of Mo.* v. *Missouri Pac. Ry.*, 111 U.S. 520.

Stewart v. *Masterson*, 131 U.S. 151.
See also Story's Eq. Pleading (10th ed.) secs. 443, 444.

Wherefore we claim and submit that if any part of the bill is good, and entitles the plaintiff to relief, the demurrer should not be sustained in whole or in part, but should be wholly overruled.

2. *The determination whether any part of the bill is good, and entitles the plaintiff to relief or discovery, should be made under the following rules:—*

(*a*) The demurrer should not be sustained unless it is absolute, certain, and clear that, taking the charges in the bill to be true, the bill would be dismissed at the hearing.

(*b*) The demurrer must be founded on some strong point of law, which goes to the absolute denial of the relief sought, and not on circumstances in which a minute variation may incline the court either to grant, modify, or refuse the application.

(*c*) If, from the circumstances stated in the bill, it appears that the result *might depend upon the effect of the evidence at a hearing*, the demurrer should be overruled.*

(*d*) A demurrer for want of equity cannot be sustained unless the court is satisfied that no discovery or proof properly called for by, or founded upon, the allegations in the bill, can make the subject matter of a suit a proper cause for equitable cognizance.

See Daniell's Chancery Pl. & Pr. (6th Am. ed.) vol. 1, pp. *542, 543, and cases there cited.
Story's Equity Pleading (10th ed.) sec. 528.

* See *Kansas* v. *Colorado*, 185 U.S. 125, pp. 145–147.

We submit it follows that we have established and sustained the twelfth, thirteenth, and fourteenth assignments of error, which are as follows: —

"XII. The court erred in this: That it sustained the defendant's demurrer to plaintiff's bill.

"XIII. The court erred in this: That it ordered, adjudged and decreed that the plaintiff's bill be dismissed, with costs to the defendant to be taxed by the clerk.

"XIV. The court erred in this: That it did not overrule the defendant's demurrer." (Gl. R. 116.)

XVI.

As to the decision of the Circuit Court sustaining the demurrer in the Gloucester case.

It has already been stated that the only thing in this case in the nature of an opinion was "the rescript," stating, "This case, in our opinion, is governed by the case of *The Newburyport Water Company* v. *City of Newburyport* and the demurrer to the bill is therefore *sustained*." (Gl. R. 89.)

It is to be remembered that the demurrer in the Newburyport case was *overruled*.

The bill in the Gloucester case contained the following allegations: —

"19. Plaintiff further says that, *in effect*, said chap. 451 of the acts of 1895 *threatened said Company with municipal competition by said City, and with the loss and ruin which would inevitably result from such municipal competition* authorized under said chapter, *unless* said Company *should sell and transfer*, apparently voluntarily, to said City the said Company's property upon the terms of said chapter as construed and applied by said commissioners

(*ante*, par. 17) *and said full court* (*ante*, par. 19); that such sale and transfer and the said acts of the plaintiff, — its officers, agents and stockholders, in reference thereto, (*ante*, par. 12 and par. 13) *were influenced and compelled by said threat and were compulsory* in fact and in law." (Gl. R. 17.)

The allegation of the bill further showed, the demurrers admitted, and the opinion of the state court held, that under the construction of the act three franchise rights, even though included in the sale, were not to be paid for; to wit, —

"1. The franchise right to take additional sources of supply in ward 8 in said City;

"2. The franchise right to lay and maintain pipes in the streets of said City;

"3. The franchise right to charge water rates for water supplied to said City and its inhabitants.

"That the value of said three rights is, in fact, covered by and included in the value and amount of the earnings and income of the plaintiff Company." (Gl. R. 11, 12.)

See also Gl. R. 12–14, and 16, 17.

The above allegations are obviously both allegations of law and allegations of fact.

Similar allegations were all sustained by the Circuit Court in the Newburyport case, except the allegations that the sale and the acts of the plaintiff in reference thereto were compulsory in *law*.

That is to say, the Circuit Court held in effect that, admitting that the act of 1895 threatened the Water Company with municipal competition by the City; admitting that the statute threatened the Company with the loss and ruin which, in fact, would inevitably result from such municipal competition unless the Company should sell

and transfer apparently voluntarily to the City the Company's property upon the terms of the chapter as construed and applied by the state court; admitting that such sale and transfer and the acts of the plaintiff in reference thereto were influenced and compelled by said threat, and were compulsory in *fact*; admitting, in short, that the *sale* was compulsory in *fact*, and that the compulsion was the result of the statutory threat of the ruin which would result from municipal competition, and that the Company was given the choice of evils, namely, whether it would submit to such ruin or to the lesser evil of selling *all* of its property and receiving in payment therefor the value of only *part* of its property, to wit, the value of the physical property, but not the value of any of its franchise rights, — such sale, however compulsory in *fact*, was *not* compulsory in *law*.

And the Circuit Court's ground for this decision is its ruling upon the crucial point, in effect, that whatever may be lawfully done may be lawfully threatened. And thus again in the Gloucester case, even more conspicuously than in the Newburyport case, the Circuit Court *ignored the qualification of the general rule* — what may be lawfully done may be lawfully threatened, to wit, that while *ordinarily* what may be lawfully done may be lawfully threatened, yet if the Government, or an officer of the Government acting under color of office, threatens an individual with serious loss, unless the individual will make a contract to do something not required by law, and if the contract is made under the influence of such threat, such contract, though voluntary in appearance, becomes thereby compulsory in fact and in law, and is obtained by duress.

See Point V. of our argument upon the Fourteenth Amendment in the Newburyport case, (*ante*, p. 68 *et seq.*)

Concerning Plaintiff's Claim Under the Clause of the Constitution Relating to the Obligation of Contracts.

Our argument upon this claim is fully covered, *mutatis mutandis*, by our argument upon the similar claim in the Newburyport case, *ante*, pp. 144 *et seq.*, to Point VII., inclusive, — to which we beg to refer.

We are obliged to note, however, that the award of the commissioners in the Gloucester case does in fact include compensation for the contract for the Company's furnishing the City with water for fire purposes.

The City claimed before the commissioners that the contract subsisting October 1, 1895, between the City and the Company — being said contract No. 2 — was not, under the act of 1895, to be included in the valuation and award under the act; *nevertheless the City, by its counsel, suggested to the commissioners that that contract be valued by the commissioners, and accordingly it was so valued.*

The valuation did not, however, appear separately, but was included in the commissioners' final award. (Gl. R. 16.)

It is to be borne in mind that these commissioners did not value the similar contract in the Newburyport case.

The commissioners reported that they "followed the rule adopted by the Court in the Newburyport case," 168 Mass. 341.

In the same paragraph they showed that they departed from that rule as follows: —

> . . . "We have also, with the respondent's consent, valued at what we deemed it worth a contract subsisting Oct. 1, 1895, between the city and the company, to furnish the former with water for its hydrants, for a certain price until Sept. 28, 1896." (Gl. R. 12.)

We have shown above that such valuation was not merely with respondent's consent, but that the City claimed to the

commissioners that the contract was not to be included in the valuation and award, and nevertheless the City, by its counsel, suggested to the commissioners that the contract be valued by them, and accordingly it was so valued. (Gl. R. 16.) Admitted by the demurrer.

It thus appears, in effect, not only that the City claimed that, under the act of 1895 the contract could *not* be valued, but that the commissioners agreed with them, and yet the City was willing to part with its money and to stultify itself by suggesting to the commissioners that they value the contract; and this was done.

What was the City's object?

Obviously the City's representatives feared that the action of the statute upon this contract would be held to be *the enactment of a law by the state which impaired the obligation of plaintiff's contract.*

We submit, under the authorities herein, that this fear was justified.

Will the present court allow plaintiff's rights in reference to this contract, and flowing out of this contract, to be violated and rendered nugatory by the obvious artifice of the City and ~~the~~ its representatives, by which the City may be freed from responsibility for property worth hundreds of thousands of dollars by the strategem of procuring some unknown, but certainly small, valuation of this contract concealed in the general award?

We leave this question to be determined between the court and the defendant, only suggesting that, though the contract is included in the award, the bill contains the following allegation admitted by the demurrer: —

> "(*f*) That no decree or judgment has yet been entered upon the said award; and no payment thereunder has been made or tendered to plaintiff." (Gl. R. 18.)

The City cannot, therefore, be harmed if the present court deprive it of all expected benefit from such artifice.

We submit that plaintiff's assignments of error VII., VIII., XII., XIII., and XIV. (Gl. R. 115, 116) should also be sustained.

As to Further Anticipated Defences.

As to the Reserved Power of Massachusetts over Corporate Franchises.

If any attempt be made to defend under such reserved power, we beg to rely upon our corresponding point VIII. (*ante*, p. 211) in the Newburyport case, and our argument under the contract clause of the Constitution (*ante*, p. 196).

As to the Police Power.

As there was no "Merrimac River episode" in the Gloucester matter, and as we know of no possible ground of complaint which might come under the broadest suggestion of the police power, we do not anticipate that this line of defences will really be attempted in the Gloucester case.

If, however, it be offered, we beg to rely upon our corresponding point IX. in the Newburyport case, under the claim concerning the contract clause of the Constitution (*ante*, p. 221).

In Conclusion as to Both Cases.

Having shown the novel character of the statutes in question, and that their novelty was by a threat coupled with an unlawful exaction which compelled each of the water companies to sell its property upon terms upon which its property could not be constitutionally taken; having shown also the attempt to disguise such unconstitutional taking under the *form* of a voluntary sale; having shown that the present court has held that "The courts are not bound by mere forms, nor are they to be misled by mere pretences; [that] they are at liberty — indeed, are under a solemn duty to look at the substance of things whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority,"* — we beg to commend to the court the language of Mr. Justice BRADLEY, speaking for the court in —

Boyd v. *United States*, 116 U.S. 616, 635, —

and quoted and adopted by Mr. Justice BREWER in —

Monongahela Navigation Co. v. *United States*, 148 U.S. at page 325, as follows: —

> "'*Illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen and against any stealthy encroachments thereon.* Their motto should be *Obsta principiis.*'"

*Mugler v. Kansas, 123 U.S. at page 661.

And as connecting the broad principles above enunciated with this recent novel attempt to parade under the *form* of the Fourteenth Amendment, while violating and betraying its *essence*, we beg, finally, to repeat the language of Mr. Justice JACKSON, as quoted and adopted by the court in —

Chicago &c. R.R. v. *Chicago*, 166 U.S. at pages 238, 239:

"In *Scott* v. *Toledo*, 36 Fed. Rep. 385, 395–396, the late Mr. Justice JACKSON, while Circuit judge, had occasion to consider this question. After full consideration that able judge said: 'Whatever may have been the power of the States on this subject prior to the adoption of the Fourteenth Amendment to the Constitution, it seems clear that, since that amendment went into effect, such limitations and restraints have been placed upon their power in dealing with individual rights that the States cannot now lawfully appropriate private property for the public benefit or to public uses without compensation to the owner, and that *any attempt so to do*, whether done in pursuance of a constitutional provision or *legislative* enactment, whether done by the *Legislature* itself or *under delegated authority* by one *of the subordinate agencies of the State, and whether done directly by taking the property of one person and vesting it in another or the public, or indirectly through the forms of law*, by appropriating the property and requiring the owner thereof to compensate himself, or to refund to another the compensation to which he is entitled, would be wanting in that "due process of law" required by said amendment. The conclusion of the Court on this question is, that since the adoption of the Fourteenth Amendment, compensation for private property taken

> for public uses constitutes an essential element in "due process of law," and that *without such compensation the appropriation of private property to public uses*, NO MATTER UNDER WHAT FORM OF PROCEDURE IT IS TAKEN, *would violate the provisions of the Federal Constitution*.'"

We submit that the same principles which have led the court to look past the *form* of taxation, and find, *in substance and effect*, an unconstitutional taking;[1] which have led the court to look past the *form* of the police power in state statutes and find, — in substance, effect, and application, — that such statutes were, in effect, for other than police purposes, and were unconstitutional;[2] which have led the court to look past the *form* of statutes regulating railroad rates and find, *in their unreasonableness and injustice as applied*, an unconstitutional *taking* of private property;[3] which have led the court to look past the *form* of an act purporting to be a *general* act, and find that, in effect, it was intended to operate *only upon a single company*, and was therefore in violation of the equal protection of the laws secured by the Fourteenth Amendment;[4] that these same principles now justify the court in looking past the *form* of a voluntary sale provided by statute and finding therein, *in substance and effect*, LEGAL COMPULSION AND DURESS RESULTING IN DEPRIVING THE PLAINTIFFS HEREIN OF THEIR RESPECTIVE PROPERTIES,

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[1] *Loan Association* v. *Topeka*, 20 Wall, 655.

Fallbrook Irrigation District v. *Bradley*, 164 U.S. at page 155.

[2] *Chy Lung* v. *Freeman*, 92 U.S. 275, 279, 281.

[3] See cases cited *ante*, p. 66.

[4] *Cotting* v. *Kansas City Stock Yards Co. &c.*, 183 U.S. 79, 103, 112.

IN VIOLATION OF THE PROVISIONS OF THE CONSTITUTION OF THE UNITED STATES, THE PROTECTION OF WHICH WE HAVE CLAIMED AND ARGUED, AND WHICH CAN BE SECURED TO US ONLY BY THE JUDGMENT OF THIS COURT.

ROBERT M. MORSE,
LAURISTON L. SCAIFE,
of Counsel for both Apellants.

APPENDIX.

[For Index to Appendix, see General Index, p. xxiii.]

MASSACHUSETTS STATUTES RELATING TO THE NEWBURYPORT WATER COMPANY AND THE CITY OF NEWBURYPORT.

EXHIBIT A. (R. 18.)

Acts and Resolves Passed by the General Court of Massachusetts in the Year 1880.

Page 184, chapter 235.

An act to incorporate the Newburyport Water Company.

Be it enacted, etc., as follows:

SECTION 1. Joseph B. Morss, William H. Huse, Edward F. Coffin, Edward P. Russell, Henry M. Cross and Lawrence B. Cushing, their associates and successors, are hereby made a corporation by the name of the Newburyport Water Company, for the purpose of furnishing the inhabitants of Newburyport with pure water for the extinguishment of fires, and for domestic and other purposes; with all the powers and privileges, and subject to all the duties, restrictions and liabilities set forth in all general laws which now are or hereafter may be in force, applicable to such corporations.

SECT. 2. Said corporation, for the purpose, aforesaid, may take and hold the water, or as much thereof as may be necessary, not exceeding one and a half million of gallons daily, of any springs, natural ponds or brooks within the limits of said city, or of Kimball's pond, in the towns of Amesbury and Merrimac, or any of the effluents from said pond, or from the Powow river, in said town of Amesbury and the town of Salisbury; and may convey said waters, or any part thereof, into and through said city and said towns of Amesbury and Salisbury; and may take and hold, by purchase or otherwise, any real estate necessary for the raising, preservation and purity of the same, or of forming dams or reservoirs to hold the same, and for lay-

ing and maintaining aqueducts and pipes for distributing the waters so taken and held in any and all parts of said city and towns of Amesbury and Salisbury; and may lay its water pipes through any private lands, with the right to enter upon the same and dig therein for the purpose of making all necessary repairs or service connections; and for the purposes aforesaid may carry its pipes under or over any water course, street, railroad, highway or other way, in such manner as not to obstruct the same; and may enter upon and dig any road or other way for the purpose of laying or repairing its aqueducts, pipes or other works; and in general may do other acts and things convenient or proper for carrying out the purposes of this act. In case either of the towns in which said Kimball's pond is situated should hereafter apply for authority to take water from the same, the powers hereby granted shall not be construed as creating any priority of right, or operate in the prejudice of such application.

SECT. 3. Said corporation may declare the quantity of water proposed to be taken under this act, not exceeding one and a half million of gallons daily, not less than three months before the waters shall be withdrawn from said springs, ponds or brooks; and within sixty days from the time it shall take any lands, springs, ponds or brooks for the purpose of this act, otherwise than by purchase, said corporation shall file in the registry of deeds for the southern district of the county of Essex a description of such lands, springs, ponds, brooks or water, sufficiently accurate for identification, and state the purposes for which it is so taken, and the title of any land so taken shall vest in said corporation; and upon such filing the terms shall be the measure and limit of the right of said corporation to take and divert the waters of such springs, ponds or brooks; but if no such notice is filed, said measure and limit shall be one and a half million of gallons daily. If at any time said corporation shall take a larger quantity of

17552

water than said limit it may be restrained by injunction from taking such larger quantity, in a suit in equity brought by any party interested.

SECT. 4. Any person or corporation injured in any way by any acts of said corporation under this act, and failing to agree with said corporation as to the amount of damages, may have the same assessed and determined in the manner provided when land is taken for highways; but no application shall be made to the county commissioners for the assessment of damages for the taking of water rights until the water is actually taken and diverted by said corporation. Any person whose water rights are thus taken or affected may apply as aforesaid within three years from the time the water is actually withdrawn or diverted, and not thereafterwards, and no suit for injury done under this act shall be brought after two years from the alleged date of the receipt of injury.

SECT. 5. If said corporation takes the water from Kimball's pond or any of its effluents, or from Powow river, it shall lay its aqueduct or main pipe for conducting the same to said city by some convenient route through the town of Amesbury. The inhabitants of any town upon the line of the works authorized by this act, upon the application of its board of selectmen, shall be entitled to the reasonable use of the water, for the same uses as are hereinbefore provided, upon paying an equitable compensation therefor, which in case of difference shall be determined by three commissioners, to be appointed by the supreme judicial court, upon application of either party and notice to the other, whose award when accepted by the court shall be binding upon the parties for the term of five years.

SECT. 6. Any town under whose roads, streets or ways said corporation lays its aqueducts or main pipe may require said corporation to insert therein proper hydrants, at points not less than five hundred feet apart, to be used for

extinguishing fires, and for no other purpose. The expense of erecting said hydrants and keeping the same in repair shall be paid by such town.

SECT. 7. If any person shall use any water taken under this act without the consent of said corporation, or shall wantonly or maliciously divert the water, or any part thereof, taken or held by said corporation pursuant to the provisions of this act, or corrupt the same or render it impure, or destroy or injure any dam, aqueduct, conduit, pipe, hydrant, machinery or other works or property held, owned or used by said corporation, under the authority of and for the purposes of this act, he shall forfeit and pay to said corporation three times the amount of damage assessed therefor, to be recovered in an action of tort; and on conviction of either of the wanton or malicious acts aforesaid may be also punished by fine not exceeding three hundred dollars, or by imprisonment in jail not exceeding one year.

SECT. 8. Said corporation may distribute the water through said city of Newburyport; may establish and fix rates and take rates for the use of said water and collect the same, and may make such contracts with the said City of Newburyport or with individuals or corporations to supply water for fire or for other purposes as may be agreed upon between said city or individuals or corporations, and said corporation: *provided* that the source of supply, the size and quality of the pipes to be used, shall be approved by the board of water commissioners to be appointed under the provisions of this act. The City of Newburyport is hereby authorized to contract for a supply of water for fire purposes for a term of years with said Newburyport Water Company: *provided*, the same is assented to by said city by a majority vote of the voters present and voting thereon at a legal meeting called for that purpose.

SECT. 9. Said corporation, for the purposes set forth in this act, may hold real and personal estate, and the

whole capital stock shall not exceed three hundred thousand dollars, to be divided into shares of one hundred dollars each.

SECT. 10. The City of Newburyport is hereby authorized to appoint a board of water commissioners, to consist of five citizens of said city, who shall be chosen by the city council by joint ballot of both branches, whose duties it shall be to investigate all questions relative to the introduction of pure water into said city; to ascertain the cost of the same, and to report the result of the investigation and deliberations upon the same to the city council, at least ten days prior to the time appointed by section twelve of this act for said city, to vote upon the acceptance of chapter two hundred and forty of the acts of the year eighteen hundred and seventy-eight. They shall serve without compensation, but the necessary expenses and liabilities incurred in the employment of engineers and personal examination of various systems of water supply shall be defrayed by said city; and the city council shall appropriate such sum or sums of money as may be needed for this purpose, and in the same manner as money is appropriated for other city purposes.

SECT. 11. The City of Newburyport shall have the right at any time after ten years from the date of the completion of said works to purchase the corporate property and all the rights and privileges of said company at a price which may be mutually agreed upon between said corporation and the said City of Newburyport; and the said corporation is authorized to make sale of the same to said city. In case said corporation and city are unable to agree, then the compensation to be paid shall be determined by three commissioners to be appointed by the supreme judicial court upon application of either party, and notice to the other, whose award when accepted by the court shall be binding upon both parties. And this authority to purchase said franchise and property is granted on condition that the

same is assented to by said city by a two-thirds vote of the voters present and voting thereon at a meeting called for that purpose.

SECT. 12. In case the City of Newburyport shall accept chapter two hundred and forty of the acts of the year eighteen hundred and seventy-eight, as revived and continued by chapter two hundred and forty of the acts of the year eighteen hundred and seventy-nine, within two months from the date of the passage of this act, and shall also within three months after so accepting the same vote to construct the works contemplated therein, and to raise and appropriate the necessary sum of money therefor, this act shall be inoperative; otherwise this act shall take effect at and upon the expiration of the said two months, and the said chapter two hundred and forty of the acts of the year eighteen hundred and seventy-eight, as revived by chapter two hundred and forty of the acts of the year eighteen hundred seventy-nine shall become void.

Approved April 23, 1880.

EXHIBIT B. (R. 22.)

Acts and Resolves of Massachusetts, 1878.

Chapter 240.

An act to supply the City of Newburyport with water.

Be it enacted, etc., as follows:

SECTION 1. The City of Newburyport is hereby authorized to supply itself and its inhabitants with pure water to extinguish fires, generate steam, and for domestic and other uses, and may establish public fountains and hydrants, and regulate their use, and may discontinue the same, and may collect such rents as may be fixed for the use of such water.

SECT. 2. Said city for the purposes aforesaid may take and hold the water, or so much thereof as may be necessary, not exceeding one and a half million of gallons daily,

17554

of any springs, natural ponds or brooks within the limits of said city, or of Kimball's pond in the towns of Amesbury and Merrimac, or any of the effluents from said pond; and may convey said waters or any part thereof into and through said city and said town of Amesbury and the town of Salisbury; and may also take and hold, by purchase or otherwise, all necessary lands for raising, holding, flowing, diverting, conducting and preserving such waters, and conveying the same to any and all parts of said city and of said towns of Amesbury and Salisbury; and may erect thereon proper dams, reservoirs, buildings, fixtures and other structures, and make excavations and embankments, and procure and run machinery therefor; and for such purposes may construct and lay down conduits, pipes and drains in, under or over any lands, watercourses, roads or railroads, and along any street, highway, or other way other than a railway, in such manner as not to unnecessarily obstruct the same; and for the purpose of constructing, laying down, maintaining and repairing such conduits, pipes and drains, and for all other purposes of this act, may dig up, raise and embank any such land, street, highway or other way, in such manner as to cause the least hindrance to travel thereon; and in general may do any other acts and things necessary or convenient and proper for carrying out the purposes of this act. In case either of the towns in which said Kimball's pond is situated should hereafter apply for authority to take water from the same, the powers hereby granted shall not be construed as creating any priority of right, or operate to the prejudice of such application.

SECT. 3. Said City of Newburyport may, by vote of its city council, declare the quantity of water proposed to be taken under this act, not exceeding one and a half million of gallons daily, such vote to be passed not less than six months before the waters shall be withdrawn from said springs, ponds or brooks; and within sixty days from the

time it shall take any lands, springs, ponds, brooks or water for the purposes of this act, otherwise than by purchase, said city shall file in the registry of deeds for the southern district of the county of Essex a description of such lands, springs, ponds, brooks or water, sufficiently accurate for identification, with a statement of the purposes for which the same are taken, together with a copy of such vote, if any has been passed, signed by the mayor of said city; and upon such filing, the terms of such vote shall be the measure and limit of the right of said city to take and divert the waters of such springs, ponds or brooks; but if no such vote is so passed and filed said measure and limit shall be one and a half million of gallons daily. If at any time said city shall take a larger quantity of water than said limit, it may be restrained by injunction from taking such larger quantity, in a suit in equity brought by any party interested.

SECT. 4. Said City of Newburyport shall be liable to pay all damages that shall be sustained by any person or persons in their property by the taking of said waters or any part thereof as authorized by this act, or by the taking of any land, rights of way, water rights or easements, or by the erection of any dams, or the construction of any aqueducts, reservoirs, water ways or other works for the purposes of this act; and if the owner or owners of any property which shall be taken as aforesaid, or other person or persons sustaining damages as aforesaid, shall not agree on the damages to be paid therefor, he or they may apply by petition for an assessment of the damages at any time within three years from the taking of the said property, or the construction of dams or other works occasioning damages as aforesaid, and not afterwards, to the superior court in the county in which the same are situated. Such petition may be filed in the clerk's office of said court, in vacation or in term time, and the clerk shall thereupon issue a summons to the said City of Newburyport, return-

17555

able, if issued in vacation, at the next term of the said court to be held after the expiration of fourteen days from the filing of said petition, and if in term time, returnable on such day as said court shall order, to appear and answer to the said petition; the said summons shall be served fourteen days at least before the term or day at which it is returnable, by leaving a copy thereof and of the said petition, certified by the officer who shall serve the same, with the clerk of said city; and the said court may, upon default or hearing of said city, appoint three disinterested persons, who shall, after reasonable notice to the parties, assess the damages, if any, which such petitioner may have sustained as aforesaid; and the award of the said persons so appointed, or a major part of them, being returned into and accepted by the said court, shall be final, and judgment shall be rendered and execution issued thereon for the prevailing party, with costs, unless one of said parties shall claim a trial by jury as hereinafter provided.

SECT. 5. If either of the parties mentioned in section four shall be dissatisfied with the amount of damage awarded as therein expressed, such party may, at the term at which such award was accepted, or the next term thereafter, claim in writing a trial in said court, and have a jury to hear and determine at the bar of said court all questions of fact relating to such damages, and to assess the amount thereof; and the verdict of said jury being accepted and recorded by the said court, shall be final and conclusive, and judgment shall be rendered and execution issued thereon, and costs shall be recovered by the said parties respectively in the same manner as is provided by law in regard to proceedings relating to the laying out of highways.

SECT. 6. If said city takes the water from Kimball's pond or any of its effluents, it shall lay its aqueduct or main pipe, for conducting the same to said city, by some convenient route through the town of Amesbury. The

inhabitants of any town upon the line of the works authorized by this act, upon the application of its board of selectmen, shall be entitled to the reasonable use of the water, for the same uses as are herein before provided, upon paying an equitable compensation therefor, which in case of difference shall be determined by three commissioners, to be appointed by the supreme judicial court upon application of either party, and notice to the other, whose award, when accepted by said court, shall be binding upon the parties for the term of five years.

SECT. 7. Any town under whose roads, streets or ways said city lays its aqueduct or main pipe may require said city to insert therein proper hydrants, at points not less than five hundred feet apart, to be used for the purpose of extinguishing fires, and for no other purpose. The expense of inserting said hydrants and keeping the same in repair shall be paid by such town.

SECT. 8. No application shall be made to the court for the assessment of damages for the taking of any water rights, or for any injury thereto, until the water is actually withdrawn or diverted by said city under the authority of this act.

SECT. 9. If any person shall use any water taken under this act without the consent of said city, or shall wantonly or maliciously divert the water, or any part thereof, taken or held by said city pursuant to the provisions of this act, or corrupt the same, or render it impure, or destroy or injure any dam, aqueduct, pipe, conduit, hydrant, machinery or other works or property held, owned or used by said City of Newburyport under the authority of and for the purposes of this act, he shall forfeit and pay the said city three times the amount of damage assessed therefor, to be recovered in an action of tort; and on conviction of either of the wanton or malicious acts aforesaid, may be also punished by fine not exceeding three hundred dollars, or by imprisonment in jail not exceeding one year.

17556

SECT. 10. For the purpose of paying all necessary expenses and liabilities incurred under the provisions of this act, said city shall have authority to issue coupon bonds to be denominated "Newburyport water bonds," to be signed by the treasurer of said city, to an amount not exceeding two hundred and fifty thousand dollars, payable at periods not exceeding thirty years from the date thereof, with interest payable semi-annually at a rate not exceeding six per centum per annum; and said city may sell said bonds at public or private sale, or pledge the same for money borrowed for the purposes of this act, upon such terms and conditions as it may deem proper. And the city council of said city is hereby authorized from time to time to appropriate, grant and assess such sum or sums of money as shall be deemed expedient, towards paying said expenses, or the principal of the money so borrowed or obtained, and the interest thereof, in the same manner as money is appropriated, granted and assessed for other city purposes.

SECT. 11. The rights, powers and authority granted to the city of Newburyport by this act shall be vested in and exercised by a board of water commissioners, consisting of three citizens of said city, who shall be chosen by the city council, by joint ballot of both branches. The said commissioners shall, during their continuance in office, execute, superintend and direct the performance of all the works, matters and things mentioned in the preceding sections which are not otherwise specifically provided for in this act; and shall be subject to such ordinances, rules and regulations, in the execution of their said trust, as the city council may from time to time ordain and establish, not inconsistent with the provisions of law. They shall serve for the period of three years from the time of their appointment, unless the construction of the works herein contemplated shall be sooner finished. Thereafter the rights, powers and authority granted to the said city by this act shall be vested in and exercised by a board of water

commissioners, consisting of three citizens of said city, who shall be chosen by the city council, by joint ballot of both branches, one for the term of one year from the first Monday of January in the year eighteen hundred and eighty-one, one for the term of two years, one for the term of three years, and annually thereafter one water commissioner shall be chosen to serve for the term of three years. Said commissioners shall receive such compensation as the city council of said city may prescribe, and a majority of said commissioners shall be a quorum for the exercise of the powers and duties prescribed by this act.

SECT. 12. The said water commissioners shall establish such prices or rents for the use of the water as to provide annually, if practicable, from the net income and receipts therefor, for the payment of the interest on said water bonds, and also, after three years from the introduction of the water into said city, for the further payment of not less than one per centum of the principal of said bonds. The net surplus income and receipts, after deducting all expenses, interest and charges of distribution, shall be set apart as a sinking fund, and applied solely to the payment of the principal of said bonds, until the same are fully paid and discharged. The "commissioners of sinking fund," as now established by ordinance of said city, shall be trustees of said fund, and shall annually, and as often as the city council may require, render an account of all their doings in relation thereto.

SECT. 13. The occupant of any tenement shall be liable for the payment of the rent for the use of the water in such tenement; and the owner thereof shall be also liable if, on being notified of such use, he does not object thereto.

SECT. 14. This act shall take effect upon its passage, and shall become void unless accepted by a vote of two thirds of the legal voters of the city of Newburyport, present and voting thereon, at a legal meeting which shall

be called in their several ward rooms for that purpose, by the mayor and aldermen of said city, within one year from the passage of this act, at which meeting the check list shall be used.

Approved May 11, 1878.

EXHIBIT C. (R. 26.)

Acts and Resolves of Massachusetts, 1879.

Chapter 240.

An act to revive "An act to supply the city of Newburyport with water."

Be it enacted, etc., as follows:

Chapter two hundred and forty of the Acts of the Year Eighteen hundred and seventy-eight, being "An act to supply the city of Newburyport with water," is hereby revived and continued for two years from the passage of this act.

Approved April 18, 1879.

EXHIBIT E. (R. 28.)

Acts and Resolves Passed by the General Court of Massachusetts in the Year 1893.

Chapter 471.

An act to supply the city of Newburyport with water.

Be it enacted, etc., as follows:

SECTION 1. The City of Newburyport may supply itself and its inhabitants with water for the extinguishment of fires and for domestic, manufacturing and other purposes, and may establish fountains and hydrants, relocate or discontinue the same; may regulate the use of such water and fix and collect rates to be paid for the use of the same.

SECT. 2. The said city, for the purposes aforesaid, may take, by purchase or otherwise, and hold the waters of

any pond, stream, spring or wells within the limits of said city not heretofore taken or purchased by the Newburyport Water Company, and the Artichoke river in West Newbury and Newburyport, and the water rights connected therewith; and obtain and take water by means of bored, driven, artesian or other wells on any lands within said city, and hold and convey said water through said city and through said town of West Newbury from said ponds and said river; and may also take and hold, by purchase or otherwise, all lands, rights of way and easements necessary for holding and preserving such water and for conveying the same to any part of said city of Newburyport; and may erect on the land thus taken or held proper dams, buildings, fixtures and other structures; and may make excavations, procure and operate machinery and provide such other means and appliances as may be necessary for the establishment and maintenance of complete and effective water works; and may construct and lay down conduits, pipes and other works: under or over any lands, water courses, railroads or public or private ways, and along any such way in such manner as not unnecessarily to obstruct the same; and for the purpose of constructing, maintaining and repairing such conduits, pipes and other works, and for all proper purposes of this act, said city may dig up any such lands, and, under the direction of the board of selectmen of the town in which any such ways are situated, may enter upon and dig up any such ways in such manner as to cause the least hindrance to public travel thereon.

SECT. 3. The city, shall within sixty days after the taking of any lands, rights of way, water rights, water sources or easements as aforesaid, otherwise than by purchase, file and cause to be recorded in the registry of deeds, for the county within which the same are situated, a description thereof sufficiently accurate for identification, with a state-

17558

ment of the purpose for which the same were taken, signed by the water commissioners hereinafter provided for.

SECT. 4. The city shall pay all damages sustained by any person or corporation in property by the taking of any land, right of way, water, water source, water right or easement, or by any other thing done by said city under the authority of this act. Any person or corporation sustaining damages as aforesaid under this act, who fails to agree with said city as to the amount of damages sustained, may have the damages assessed and determined in the manner provided by law when land is taken for the laying out of highways, on application at any time within the period of three years from the taking of such land or other property, or in the doing of other injury, under the authority of this act, but no such application shall be made after the expiration of said three years. No application for assessment of damages shall be made for the taking of any water, water right, or for any injury thereto, until the water is actually withdrawn or diverted by said city under authority of this act.

SECT. 5. The said city may, for the purpose of paying the necessary expenses and liabilities incurred under the provisions of this act, issue from time to time bonds, notes or scrip, to an amount not exceeding in the aggregate four hundred thousand dollars; such bonds, notes or scrip shall bear on their face the words, "Newburyport water loan;" shall be payable at the expiration of periods not exceeding thirty years from the date of issue; shall bear interest payable semi-annually at a rate not exceeding six per centum per annum, and shall be signed by the treasurer of the city and be countersigned by the water commissioners hereinafter provided for. The said city may sell such securities at public or private sale, or pledge the same for money borrowed for the purposes of this act, upon such terms and conditions as it may deem proper, *provided*, that such securities shall not be sold for less than the par value thereof.

The city shall provide, at the time of contracting said loan, for the establishment of a sinking fund, and shall annually contribute to such fund a sum sufficient with the accumulations thereof to pay the principal of said loan at maturity. The said sinking fund shall remain inviolate and pledged to the payment of said loan and shall be used for no other purpose.

SECT. 6. The said city instead of establishing a sinking fund may, at the time of authorizing said loan, provide for the payment thereof in such annual proportionate payments as will extinguish the same within the time prescribed in this act; and when such vote has been passed the amount required thereby shall, without further vote, be assessed by the assessors of said city in each year thereafter, until the debt incurred by said loan shall be extinguished in the same manner as other taxes are assessed, under the provisions of section thirty-four of chapter eleven of the public statutes.

SECT. 7. The return required by section ninety-one of chapter eleven of the public statutes shall state the amount of any sinking fund established under this act, and if none is established, whether action has been taken in accordance with the provisions of the preceding section, and the amounts raised and applied thereunder for the current year.

SECT. 8. The said city shall raise annually by taxation a sum which, with the income derived from the water rates, will be sufficient to pay the current annual expenses of operating its water works, and the interest as it accrues on the bonds, notes and scrip issued as aforesaid by said city, and to make such contributions to the sinking fund and payments on the principal as may be required under the provisions of this act.

SECT. 9. Whoever wilfully or wantonly corrupts, pollutes or diverts any of the waters taken or held under this act, or injures any structure, work or other property

17559

owned, held or used by said city under the authority and for the purposes of this act, shall forfeit and pay to said city three times the amount of damages assessed therefor, to be recovered in an action of tort; and upon conviction of either of the above wilful or wanton acts shall be punished by a fine not exceeding three hundred dollars, or by imprisonment not exceeding one year.

SECT. 10. The powers and duties granted to and imposed upon the City of Newburyport by this act shall be exercised by a board of water commissioners, consisting of five residents of the city, to be appointed by the mayor with the approval of the city council. Said commissioners shall be appointed and hold their office from the time of their appointment and approval, for the terms of one, two, three, four and five years, respectively, from the first Monday of May next following their appointment; and thereafter one commissioner shall be appointed each year for the term of five years from the first Monday of May. All such commissioners, except in a case of removal, shall hold office until their successors are appointed in their stead. Vacancies occurring during the term may be filled for the remainder of the term. No person shall be appointed commissioner who holds, at the time, any city office by popular election. Any commissioner, after due notice and hearing, may be removed at any time by a two-thirds vote of each branch of the city council, for any cause which shall be deemed sufficient, and shall be expressed in the vote of removal. The commissioners shall receive no compensation for their services unless the city council by a two-thirds vote of each branch thereof otherwise determine, and in such case the amount of compensation may be fixed by a like two-thirds vote.

SECT. 11. The water commissioners shall fix such prices or rents for the use of water as shall produce annually, as near as may be, a net surplus equal to two per centum of the total amount of the bonds, notes and scrip issued under

this act, after paying all current expenses of operating the water works and interest upon loans, and after the payment of all expenses for new construction not exceeding ten thousand dollars in any one year. The commissioners of sinking funds of the city of Newburyport shall be trustees of a sinking fund which shall be set apart for the payment and redemption of said water loan, and which shall remain invoiolate and pledged to the payment of said loan, and shall be used for no other purpose. The net surplus thereof shall be paid into the sinking fund, and if said surplus does not equal two per centum of the total amount of the bonds, notes and scrip issued under this act, the city shall raise by general taxation a sum which with the surplus shall equal said two per centum, and shall contribute said sum to the sinking fund. The commissioners shall annually, and as often as the city council may require, render an account of all their doings in relation to the sinking fund, and shall be governed by the provisions of section seven of chapter twenty-nine of the Public Statutes, except as herein otherwise provided.

SECT. 12. At any time within sixty days after the passage of this act, and not after sixty, the Newburyport Water Company may notify the mayor of Newburyport in writing that it desires to sell to said city its corporate property and all the rights and privileges of said company, and execute and deliver to said city proper deeds and instruments in writing, conveying to said city the property aforesaid: *provided, however*, the legal voters of the city of Newburyport, at legal meetings to be called in the several wards of said city within six months after said notification has been received as aforesaid, shall, by a majority vote of the voters of said city present and voting thereat at said meetings, vote to purchase the aforesaid property upon the terms and conditions contained in this section, whereupon the property thus conveyed shall become the property of the City of Newburyport, and

17560

said city shall be liable to pay to said company the fair value of the property thus conveyed; and in case the said city and the said company shall be unable to agree upon the value of said property, the supreme judicial court may, upon application of either party and notice to the other, appoint three commissioners, one of whom shall be a skilled engineer, and one learned in the law, who shall determine the fair value of said property conveyed as aforesaid, and whose award when accepted by the court shall be final.

SECT. 13. After the vote provided for in section twelve of this act, or provided the Newburyport Water Company does not so notify the said mayor within said sixty days, this act shall be submitted to the legal voters of the city of Newburyport for their acceptance or rejection, at legal meetings to be called in the several wards of said city within eight months from the passage of this act, and shall take effect from and after its acceptance by a two-thirds vote of the voters of said city present and voting thereon at such meetings. The vote shall be by separate ballot, and the ballot shall be Yes, or No, in answer to the question, "Shall the City of Newburyport accept chapter — of the Acts of eighteen hundred and ninety-three, authorizing the City of Newburyport to establish and maintain a system of water supply for domestic and other uses?" This act shall be void if not accepted by said vote.

Approved June 10, 1893.

EXHIBIT H. (R. 33.)

Acts and Resolves Passed by the General Court of Massachusetts for the Year 1894.

Chapter 474.

An act to provide for the purchase of the property of the Newburyport Water Company by the City of Newburyport.

Be it enacted, etc., as follows:

SECTION 1. If, within thirty days after the passage of this act, the Newburyport Water Company shall notify the mayor of the city of Newburyport, in writing, that it desires to sell to said city all the rights, privileges, easements, lands, waters, water rights, dams, reservoirs, pipes, engines, boilers, machinery, fixtures, hydrants, tools and all apparatus and appliances owned by said company and used in supplying said city and the inhabitants thereof with water, said city shall not proceed to supply water to itself or its inhabitants under the authority of chapter four hundred and seventy-one of the Acts of the year eighteen hundred and ninety-three, unless it shall have first purchased of said company the property aforesaid; and said company is authorized to make sale of said property to said city, and said city is authorized to purchase the same. Whenever said city shall, by a majority vote of the legal voters of said city present and voting thereon at a meeting called for that purpose, vote to purchase said property, notice of the desire of said company to sell the same having been given as hereinbefore provided, said company shall, within twenty days after the vote aforesaid, execute and deliver to said city proper deeds and instruments in writing, conveying to said city the property aforesaid, and said property thus conveyed shall thereupon become the property of said city, and said city shall pay to said company the fair value thereof, to be ascertained as hereinafter provided. If at the first meet-

17561

ing a majority of the voters present and voting do not vote to purchase said property, other meetings may be called and held therefor. In case the said city and the said company shall be unable to agree upon the value of said property, the supreme judicial court shall, upon application of either party and notice to the other, appoint three commissioners, two of whom shall be skilled engineers and the third learned in the law, who shall determine the fair value of said property for the purposes of its use by said city, and whose award, when accepted by the court, shall be final. Such value shall be estimated without enhancement on account of future earning capacity or good will, or on account of the franchise of said company.

SECT. 2. In case said Newburyport Water Company shall convey its property to the City of Newburyport, in accordance with the provisions of the preceding section, said city shall manage and use the property thus conveyed for the purposes and under the provisions of chapter four hundred and seventy-one of the Acts of the year eighteen hundred and ninety-three.

SECT. 3. The said city may, for the purpose of paying the necessary expenses and liabilities incurred under the provisions of this act, issue from time to time bonds, notes or scrip to an amount sufficient for such purpose; such bonds, notes or scrip shall bear on their face the words, "Newburyport water loan," shall be payable at the expiration of periods not exceeding thirty years from the date of issue, shall bear interest payable semi-annually at a rate not exceeding six per centum per annum, and shall be signed by the treasurer of the city and countersigned by the water commissioners provided for by chapter four hundred and seventy-one of the Acts of the year eighteen hundred and ninety-three. The said city may sell such securities at public or private sale, or pledge the same for money borrowed for the purposes of this act, upon such terms and

conditions as it may deem proper, provided that such securities shall not be sold for less than the par value thereof. The city shall provide at the time of contracting said loan for the establishment of a sinking fund, and shall annually contribute to such fund a sum sufficient with the accumulations thereof to pay the principal of such loan at maturity. The said sinking fund shall remain inviolate and pledged to the payment of said loan, and shall be used for no other purpose.

SECT. 4. In case said city shall, in violation of section one of this act, proceed to supply itself or its inhabitants with water before making the purchase aforesaid, the supreme judicial court shall, upon petition of said company, have jurisdiction in equity to enjoin said city from so doing until it shall have made such purchase.

SECT. 5. This act shall take effect upon its passage.

Approved June 14, 1894.

MASSACHUSETTS STATUTES RELATING TO THE GLOUCESTER WATER SUPPLY COMPANY AND THE CITY OF GLOUCESTER.

EXHIBIT A. (Gl. R. 19.)

Acts and Resolves of Massachusetts, 1881, Chap. 167.

An act to incorporate the Gloucester Water Supply Company.

Be it enacted, etc., as follows:

SECTION 1. Joseph O. Proctor, Robert R. Fears, Samuel A. Stacy, Robert A. Tibbets, Nehemiah D. Cunningham, their associates and successors, are hereby made a corporation by the name of the Gloucester Water Supply Company, for the purpose of furnishing the inhabitants of Gloucester with pure water for the extinguishment of fires, and for domestic, mechanical and other purposes; with all the powers and privileges, and subject to all the duties, restrictions and liabilities set forth in all general laws

17562

which now are or hereafter may be in force, applicable to such corporations.

SECTION 2. Said corporation may for the purposes aforesaid take, hold and convey through the city of Gloucester, or any part thereof, the water of any springs, natural ponds, brooks or other water sources in ward eight of said city, and may take and hold by purchase or otherwise any real estate necessary for the preservation and purity of the same, or for forming any dams or reservoirs to hold the same, and for laying and maintaining aqueducts and pipes for distributing the water so taken and held; and may lay its water pipes through any private lands, with the right to enter upon the same and dig therein for the purpose of making all necessary repairs or service connections; and for the purposes aforesaid may carry its pipes under or over any water course, street, railroad, highway or other way, in such manner as not unnecessarily to obstruct the same; and may, under the direction of the city authorities of Gloucester, enter upon and dig up any road or other way for the purpose of laying or repairing its aqueducts, pipes or other works; and in general may do any other acts and things convenient and proper for carrying out the purposes of this act.

SECTION 3. Said corporation shall, within sixty days after the taking of any land or water rights under the provisions of this act, otherwise than by purchase, file in the registry of deeds for the southern district of the county of Essex a description of any land so taken, sufficiently accurate for identification with a statement of the purposes for which it is so taken, and the title of the land so taken shall vest in said corporation. Any person or corporation injured in property by any acts of said corporation, and failing to agree with said corporation as to the amount of damages, may have the same assessed and determined in the manner provided when land is taken for highways; but no application shall be made to the county commissioners

for the assessment of damages for the taking of water rights until the water is actually taken and diverted by said corporation. Any person whose water rights are thus taken or affected may apply as aforesaid within three years from the time the water is actually withdrawn or diverted, and not thereafter; and no suit for injury done under this act shall be brought after three years from the date of the alleged receipt of injury.

SECTION 4. Said corporation may distribute the water through said city of Gloucester, may establish and fix from time to time rates for the use of said water, and collect the same, and make such contracts with the said City of Gloucester, or with individuals, or corporations, to supply water for fire or for other purposes, as may be agreed upon by said city, or individuals, or corporations, and said corporation. The City of Gloucester, by a majority vote of its city council present and voting jointly thereon, is hereby authorized to contract for a supply of water for fire or other purposes, for a term of years with said Gloucester Water Supply Company; *provided*, the contract is assented to by said city by a majority vote of the voters present and voting thereon at meetings called for that purpose in the several wards of said city.

SECTION 5. The capital stock of said corporation shall not exceed three hundred and fifty thousand dollars and shall be divided into shares of one hundred dollars each; and said corporation may at any time issue bonds to an amount equal to the capital stock actually paid in.

SECTION 6. If any person shall use any of said water taken under this act without the consent of said corporation, or shall wantonly or maliciously divert the water or any part thereof so taken, or corrupt the same, or render it impure, or destroy or injure any dam or aqueduct, pipe, conduit, hydrant, machinery, or other works or property held, owned or used by said corporation, under the authority of and for the purposes of this act, he shall forfeit and

17563

pay to said corporation three times the amount of damages assessed therefor, to be recovered in an action of tort; and on conviction of either of the wanton or malicious acts aforesaid may be punished by fine not exceeding three hundred dollars, or by imprisonment in jail not exceeding one year.

SECTION 7. The City of Gloucester shall have the right, at any time during the continuance of the charter hereby granted, to purchase the corporate property and all the rights and privileges of said company, at a price which may be mutually agreed upon between said corporation and the said City of Gloucester; and the said corporation is authorized to make sale of the same to said city. In case said corporation and said city are unable to agree, then the compensation to be paid shall be determined by three commissioners, to be appointed by the supreme judicial court upon application of either party and notice to the other, whose award, when accepted by the court, shall be binding upon both parties. And this authority to purchase said franchise and property is granted on condition that the same is assented to by said city by a two-thirds vote of the voters present and voting thereon at meetings called for that purpose in the several wards of said city.

SECTION 8. For the purposes of defraying the cost of such property, lands, water and water rights as shall be purchased for the purposes aforesaid, the City of Gloucester through its treasurer may from time to time issue notes, bonds, scrip or certificates of debt, to be denominated on the face thereof Gloucester water loan, to any amount not exceeding the amount paid by the city for said purchase, and bearing interest at a rate not exceeding six per centum per annum payable semi-annually, and the principal being payable at periods of not more than thirty years from the issue of said notes, bonds, scrip or certificates of debt, respectively. Said treasurer, under the authority of the city council, may sell such notes, bonds, scrip or

certificates of debt, or any part thereof, from time to time, or pledge the same for any money borrowed for the purposes aforesaid, on such terms and conditions as may be prescribed by the city council, or, in case the city council prescribe no terms and conditions, on such terms and conditions as he may deem proper; and said city shall annually raise by taxation an amount sufficient together with the net income received from rents for the use of said water, to pay the interest on said loans as it accrues; and shall establish at the time of contracting said debt a sinking fund, and contribute thereto from year to year an amount raised by taxation, not exceeding ten thousand dollars in any one year, sufficient with its accumulations to extinguish the debt at maturity; and said sinking fund shall remain inviolate and pledged to the payment of said debt and shall be used for no other purpose.

SECTION 9. In case the City of Gloucester shall purchase the property, rights, privileges and franchises of the corporation established by this act, the said city shall exercise all the rights, powers and authority and be subject to all the restrictions, duties and liabilities herein contained, in such manner and by such officers, servants or agents as said city may direct, and the said city shall be liable to damages for land, water or water rights taken for the purposes set forth in this act which shall not have been previously paid by said corporation.

SECTION 10. This act shall be null and void unless within three years from its passage said corporation shall avail itself of its provisions, and commence a prosecution of the work herein authorized.

SECTION 11. The owners of lands and water rights taken under this act, upon application by either party for an estimate of damages, may require said corporation to give security, satisfactory to the board of aldermen of said city for the payment of all damages and costs which may be awarded to them for the land or other property taken.

17564

And if, upon petition of the owner, with notice to the adverse party, the security appears to the aldermen of said city to have become insufficient, they shall require said corporation to give further security to their satisfaction; and all the right or authority of the corporation to enter upon or use said land and other property, except for making surveys, shall be suspended until it gives the security required.

SECTION 12. This act shall take effect upon its passage. *Approved March* 31, 1881.

EXHIBIT B. (Gl. R. 22.)

Acts and Resolves of Massachusetts, 1880, Chap. 203.

An act to supply the city of Gloucester with pure water.

Be it enacted, &c., as follows:

SECTION 1. The City of Gloucester is hereby authorized to take, hold and convey into and through said city or any part thereof, the waters of any springs, natural ponds, brooks or other water sources within its own limits, for the use of said city and the inhabitants thereof, for the extinguishment of fires, creating steam, domestic and other purposes; and may also take and hold, by purchase or otherwise, lands, or estates for the construction of such works as may be necessary therefor; and for laying and maintaining aqueducts or pipes, constructing and maintaining reservoirs or canals, and such other works as may be deemed necessary or proper for conveying, raising, forcing, retaining, distributing or disposing of said water.

SECTION 2. The mayor of said city of Gloucester shall, within sixty days after taking any of the land aforesaid, file in the registry of deeds for the county of Essex, southern district, a description thereof sufficiently accurate for identification.

SECTION 3. Said city for the purposes aforesaid may build aqueducts and maintain the same by any works

suitable therefor; may provide and maintain suitable machinery for raising the water above the source of supply; may erect such structures as are necessary for preserving the works; may make and maintain suitable dams and reservoirs, and establish such public fountains and hydrants as are at any time deemed proper, and may change or discontinue the same; may distribute the water throughout said city, regulate its use and establish the rates to be paid therefor. Said city may also for the purposes aforesaid carry its pipes and other works over or under any water course, street, railroad or highway, in such manner as not to obstruct the same; and may do any other acts and things necessary and proper in executing the purposes of this act.

SECTION 4. Said city shall be liable to pay all damages sustained by any person or corporation by taking any land, water, water rights, or property, or by the constructing of any aqueduct, reservoir, or other works for the purposes aforesaid; and if any person or corporation sustaining damages as aforesaid cannot agree with the city upon the amount of said damages, he or it may have them assessed in the same manner as is provided by law with respect to land taken for highways.

SECTION 5. For the purpose of defraying the expenses which may be incurred by the city of Gloucester in carrying into effect the powers granted by this act, the city council shall have authority to issue from time to time, notes, scrip, bonds or certificates of debt, to be denominated on the face thereof "City of Gloucester water loan," to an amount not exceeding three hundred thousand dollars; the same to bear interest not exceeding the rate of six per cent. per annum, and the principal to be payable at periods not more than thirty years from the issuing of said notes, scrip, bonds or certificates of debt respectively; and the city council may sell the same or any part thereof, from time to time, at public auction or private sale, or

17565

pledge the same for money borrowed for the purposes of this act, on such terms and conditions as the city council shall judge proper. The net surplus income and receipts shall be set apart as a sinking fund and applied solely to the payment of the principal of said loan. The mayor, city treasurer and president of the common council for the time being, shall be trustees of said fund, and shall whenever required by the city council render an account of all their doings in relation thereto. And the city council of said city is hereby authorized, from time to time, to appropriate, grant and assess such sum or sums of money as shall be deemed expedient toward paying the principal of the money so borrowed or obtained, and the interest thereof, in the same manner as money is appropriated, granted and assessed for other city purposes.

SECTION 6. The rights, powers and privileges hereby granted may be exercised by such officers, agents and servants as said city may select or employ, who shall be subject to such ordinances, rules and regulations as the city council may establish, and the mayor shall be eligible to such office.

SECTION 7. If any person shall use any of the said water without the consent of said city, or shall wantonly or maliciously divert the water or any part thereof, of the ponds, springs, streams or sources of water taken or held by said city, pursuant to the provisions of this act, or corrupt the same; or render it impure, or destroy or injure any dam, aqueduct, pipe, conduit, hydrant, machinery or other works or property held, owned or used by said city under the authority and for the purposes of this act, he shall forfeit and pay to said city three times the amount of damages assessed therefor, to be recovered in an action of tort; and on conviction of either of the wanton or malicious acts aforesaid may also be punished by fine not exceeding three hundred dollars, or by imprisonment in jail not exceeding one year.

SECTION 8. This act shall take effect upon its passage, and shall become void unless accepted by two-thirds of the legal voters of the city of Gloucester, present and voting thereon, at a legal meeting which shall be called in their several ward rooms for that purpose by the mayor and aldermen of said city, within six months from the passage of this act, at which meeting the check list shall be used.

Approved April 17, 1880.

EXHIBIT D. (Gl. R. 27.)

Acts and Resolves of Massachusetts, 1887, Chapter 288.

An act to amend the charter of the Gloucester Water Supply Company.

Be it enacted, etc., as follows:

SECTION 1. Section four of chapter one hundred and sixty-seven of the Acts of the Year Eighteen hundred and eighty-one is hereby amended by adding at the end of said section the following words: — or at any regular municipal election; and the warrant for notifying such meetings if called specially as aforesaid shall specify when the polls shall be opened for the purpose of voting and when they shall be closed.

SECTION 2. This act shall take effect upon its passage.

Approved May 19, 1887.

EXHIBIT K. (Gl. R. 48. Erroneously indexed in the Record, p. 40.)

Acts and Resolves of Massachusetts, 1895, Chap. 451.

An act to supply the city of Gloucester with water.

Be it enacted, etc., as follows. —

SECTION 1. The City of Gloucester may supply itself and its inhabitants with water for the extinguishment of fires and for domestic, manufacturing and other purposes; and may establish fountains and hydrants, relocate or dis-

17566

continue the same, may regulate the use of such water and fix and collect rates to be paid for the use of the same.

SECTION 2. Said city, for the purposes aforesaid, may take, by purchase or otherwise, and hold the waters of any pond, stream, spring or wells not heretofore taken or purchased by the Gloucester Water Supply Company, within the limits of said city, also the Chebacco lakes in the towns of Essex, Wenham and Hamilton, and the waters which flow into the same and the water rights connected therewith, and may obtain and take water by means of bored, driven, artesian or other wells, on any land within said city, and hold and convey said water through said city and through said towns of Essex, Wenham and Hamilton, from said lakes, and may also take and hold, by purchase or otherwise, all lands, rights of way and easements necessary for holding, storing, purifying and preserving such water and for conveying the same to any part of said city of Gloucester; and may erect on the lands thus taken or held, proper dams, reservoirs, buildings, fixtures and other structures, and may make excavations, procure and operate machinery, and provide such other means and appliances as may be necessary for the establishment and maintenance of complete and effective water works, and may construct and lay down conduits, pipes and other works, under or over any lands, water courses, railroads or public or private ways, and along any such way in such manner as not unnecessarily to obstruct the same; and for the purpose of constructing, maintaining and repairing such conduits, pipes and other works and for all proper purposes of this act, said city may dig up any such lands, and, under the direction of the board of selectmen of the town in which said ways are situated, may enter upon and dig up any such ways in such manner as to cause the least hindrance to public travel thereon. The title to all land taken or purchased under the provisions of this act shall vest in said city, and the land so taken may be managed,

improved and controlled by the board of water commissioners hereinafter provided for, in such manner as they shall deem for the best interests of said city.

SECTION 3. Said city shall, within ninety days after the taking of any lands, rights of way, water rights, water sources or easements as aforesaid, otherwise than by purchase, file and cause to be recorded in the registry of deeds for the southern district for the county of Essex a description thereof sufficiently accurate for identification, with a statement of the purpose for which the same were taken, signed by the water commissioners hereinafter provided for.

SECTION 4. Said city shall pay all damages sustained by any person or corporation in property by the taking of any lands, right of way, water, water sources, water rights or easements, or by any other thing done by said city under the authority of this act. Any person or corporation sustaining damages as aforesaid under this act, who fails to agree with said city as to the amount of damages sustained, may have the damages assessed and determined in the manner provided by law when land is taken for the laying out of highways, on making application at any time within the period of two years from the taking of such land or other property or the doing of other injury under the authority of this act; but no such application shall be made after the expiration of said two years. No application for the assessment of damages shall be made for the taking of any water, water right or for any injury thereto until the water is actually withdrawn or diverted by said city under the authority of this act. Said city shall pay all damages sustained under the authority of this act by the town of Essex in its alewife fishery, which, unless agreed upon, shall be assessed and determined in the manner hereinbefore provided; *provided, however*, that said city may construct and maintain suitable fishways for the preservation of said alewife fishery, said fishways to be constructed

17567

to the satisfaction of and to be approved by the commissioners on inland fisheries and game.

SECTION 5. In every case of a petition to the superior court for an assessment of damages the city may tender to the complainant or his attorney any sum, or may bring the same into court to be paid to the complainant for the damages by him sustained or claimed in his petition, or may in writing offer to be defaulted and that damages may be awarded against it for the sum therein expressed, and if the complainant does not accept such sum, with his costs up to that time, but proceeds in his suit, and does not recover greater damages than were so offered or tendered, not including interest on the sum recovered in damages from the date of such offer or tender, the city shall have judgment for its costs after said date, for which execution shall issue; and the complainant, if he recovers damages, shall be allowed his costs only to the date of such offer or tender.

SECTION 6. Said city may, for the purpose of paying the necessary expenses and liabilities incurred under the provisions of this act, issue from time to time bonds, notes or scrip, to an amount sufficient for such purpose, to be determined by the board of water commissioners hereinafter provided for. Such bonds, notes or scrip shall bear on their face the words, City of Gloucester water loan, and shall be payable at the expiration of periods not exceeding thirty years from the date of issue, shall bear interest, payable semi-annually, at a rate not exceeding six per cent. per annum, and shall be signed by the treasurer of the city and be countersigned by the water commissioners hereinafter provided for. Said city may sell such securities at public or private sale, or pledge the same for money borrowed for the purpose of this act, and upon such terms and conditions as it may deem proper; *provided*, that such securities shall not be sold for less than the par value thereof. Said city shall provide at the time of con-

tracting said loan for the establishment of a sinking fund and shall annually contribute to such fund a sum sufficient with the accumulations thereof to pay the principal of such loan at maturity. Said sinking fund shall remain inviolate and pledged to the payment of said loan, and shall be used for no other purpose.

SECTION 7. Said city instead of establishing a sinking fund may, at the time of authorizing said loan, provide for the payment thereof in such annual proportionate payments as will extinguish the same within the time prescribed in this act; and when such vote has been passed the amount required thereby shall without further vote be assessed by the assessors of said city in each year thereafter until the debt incurred by said loan shall be extinguished, in the same manner as other taxes are assessed under the provisions of section thirty-four of chapter eleven of the Public Statutes.

SECTION 8. The return required by section ninety-one of chapter eleven of the Public Statutes shall state the amount of any sinking fund established under this act, and if none is established whether action has been taken in accordance with the provisions of the preceding section, and the amounts raised and applied thereunder for the current year.

SECTION 9. Said city shall raise annually by taxation a sum which, with the income derived from water rates, will be sufficient to pay the current annual expenses of operating its water works and the interest as it accrues on the notes, bonds and scrip issued as aforesaid by said city, and such contributions to the sinking fund and payments on the principal as may be required under the provisions of this act.

SECTION 10. Whoever uses any water taken under this act without the consent of said city, or wilfully or wantonly corrupts, pollutes or diverts any of the waters taken or held by said city pursuant to the provisions of this act, or

17568

destroys or injures any structure, work or other property owned, held or used by said city under the authority and for the purposes of this act, shall forfeit and pay to said city three times the amount of damages assessed therefor, to be recovered in an action of tort; and upon conviction of either of the above wilful or wanton acts shall also be punished by a fine not exceeding three hundred dollars or by imprisonment not exceeding one year.

SECTION 11. The occupant of any tenement shall be liable for the payment of the rent for the use of water in such tenement, and the owner shall also be liable, in case of non-payment by the occupant, for all sums due for the use of water under this act, to be collected in an action of contract in the name of the City of Gloucester.

SECTION 12. The powers and duties granted and imposed upon the City of Gloucester by this act, including the purchase or taking of any lands or other property or rights, shall be exercised by a board of water commissioners, consisting of three residents of the city, to be appointed by the mayor, with the approval of the city council. Said commissioners shall be appointed and hold their office from the time of their appointment and approval for the terms of one, two and three years, respectively, from the first Monday of February next following their appointment, and thereafter one commissioner shall be appointed each year for the term of three years from the first Monday in February; all such commissioners, except in case of removal, shall hold office until their successors are appointed in their stead; vacancies occurring during the term may be filled for the remainder of the term. No person shall be appointed commissioner who holds at the time any city office by popular election. Any commissioner, after due notice and hearing, may be removed at any time by a two thirds vote of each branch of the city council for any cause which shall be deemed sufficient and shall be expressed in the vote of removal. The commissioners shall receive

such compensation for their services as the city council, by a two thirds vote of each branch thereof, shall determine.

SECTION 13. Said commissioners shall superintend and direct the construction, execution and performance of all the works, matters and things mentioned in the preceding sections; they shall be subject to such ordinances, rules and regulations in the execution of such duties as the city council may from time to time ordain and establish, not inconsistent with the provisions of this act and the laws of this Commonwealth. Said water commissioners shall make all contracts for the above purpose in the name and behalf of the city, but no contracts shall be made by them which involve the expenditure of money not already appropriated for the purpose by the city council. A majority of said commissioners shall be a quorum for the exercise of the powers and the performance of the duties of the commission.

SECTION 14. Said commissioners shall fix such prices or rents for the use of water as shall produce annually as near as may be a net surplus over operating expenses and interest charges equal to two per cent. of the total amount of the bonds, notes or scrip issued under this act, after paying all current expenses of operating the water works and interest upon loans, and after payment of all expense for new construction, not exceeding ten thousand dollars in any one year after the original construction. The commissioners of sinking funds of the city of Gloucester shall be trustees of the sinking fund which shall be set apart for the payment and redemption of said water loan, and which shall remain inviolate and pledged to the payment of said loan and shall be used for no other purpose. The net surplus aforesaid shall be paid into the sinking fund, if any is established hereunder, and if said surplus does not equal two per cent. of the total amount of the bonds, notes and scrip issued under this act, the city shall raise by general

17569

taxation a sum which, with the surplus, will equal said two per cent., and shall contribute said sum to the sinking fund. Said commissioners shall annually, and as often as the city council may require, render an account of all their doings in relation to the sinking fund, and shall be governed by the provisions of section eleven of chapter twenty-nine of the Public Statutes, except as herein otherwise provided.

SECTION 15. The town of Essex may connect water pipes with the main pipe of the city of Gloucester in said town, such connection to be made to the satisfaction of the engineer of said city, and in such case said city shall furnish to the inhabitants of said town through the pipes so connected a supply of water for the extinguishment of fires and for domestic and other purposes, for which the town of Essex shall pay to said city an equitable compensation. Said compensation in case of disagreement, shall be determined by three commissioners to be appointed by the supreme judicial court, upon application of either party and notice to the other, and the award of said commissioners, when accepted by said court, shall be binding upon the parties for the term of five years. Nothing in this act shall be construed to prevent the towns of Essex, Wenham, and Hamilton from supplying themselves with water from the Chebacco lakes for the extinguishment of fires and for domestic and other purposes, or to prevent the town of Manchester from so supplying itself from Gravel pond, so-called.

SECTION 16. If within thirty days after this act shall have been accepted by the City of Gloucester, as hereinafter provided, the Gloucester Water Supply Company shall notify the mayor of the city of Gloucester in writing that it desires to sell to said city all the corporate property and all the rights, privileges, easements, lands, waters, water rights, dams, reservoirs, pipes, engines, boilers, machinery, fixtures, hydrants, tools and all appliances

owned by said company, and used in supplying said city and the inhabitants thereof with water, and shall file with the city clerk of said city a specification and description thereof, said city shall not proceed to supply water to itself or its inhabitants under the authority of this act, unless it shall have first purchased of said company the property aforesaid; and said company is authorized to make sale of said property to said city, and said city is authorized to purchase the same and manage and use the property thus conveyed for the purposes and under the provisions of this act. Whenever, within one year from the passage of this act, said city shall by a majority vote of the legal voters of said city, present and voting thereon at a legal meeting called for that purpose by order of the city council, or at any regular municipal election, vote to purchase said property, notice of the desire of said company to sell the same having been given as hereinbefore provided, said property shall thereupon become the property of said city, and said city shall pay to said company the fair value thereof, to be ascertained as hereinafter provided. In case said city and said company, after conference thereon, shall be unable to agree upon the value of said property, the supreme judicial court shall, upon application of either party and notice to the other, appoint three commissioners, who shall determine the fair value of said property, and whose award, when accepted by the court, shall be final. Such value shall be estimated without enhancement on account of future earning capacity, or future good will, or on account of the franchise of said company.

SECTION 17. This act shall be submitted to the qualified voters of the city of Gloucester for its acceptance and shall be void unless such voters, voting in their respective wards and precincts at a legal meeting called for that purpose by order of the city council, in the same manner as meetings for municipal elections are called, or at any regular municipal election, shall, within one year from the passage of

17570
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this act, determine by ballot by a majority vote of those present and voting thereon to accept the same. The warrant for notifying such meeting, if called specially as aforesaid, shall specify when the polls shall be opened for the purpose of voting and when they shall be closed.

SECTION 18. So much of this act as authorizes the submission of the question of its acceptance to the legal voters of said city shall take effect upon its passage, but it shall not take further effect unless and until accepted as hereinbefore provided, by the qualified voters of said city; and the number of meetings called for the purpose of voting upon the question of its acceptance shall not exceed three in any one year.

Approved June 4, 1895.

MASSACHUSETTS STATUTES INVOLVED IN THE GREENWOOD CASE.

Greenwood v. *Freight Co.*, 105 U.S. 13.

Chapter 342 of the Acts of 1872 is as follows: —

An act to incorporate the Union Freight Railroad Company.

Be it enacted, etc., as follows:

SECTION 1. George B. Upton, Percival L. Everett, Henry S. Russell, their associates and successors, are hereby made a corporation by the name of the Union Freight Railroad Company, for the purpose of locating, constructing, maintaining and operating a railroad, for public use in the conveyance of freight only, with convenient single or double tracks, between the terminal points of the several steam railroads entering the city of Boston, and extending in and through such portions of the following streets as may be necessary for that purpose, namely: Lowell, Brighton, Causeway, Minot, Nashua, Commercial, Prince, Hanover, Fleet, India, Broad, Atlantic Ave-

nue, Federal, Kneeland, Cove, Lincoln and Eliot streets, and upon and over such other streets as the board of aldermen of said city may from time to time determine, on the petition of the said corporation; with the right also to construct, use and maintain side tracks from its main tracks to any wharf or wharves or warehouses, when requested, in writing, so to do by a majority in interest of the owners or occupants of such wharves or warehouses: *provided, however*, that no side track shall be laid upon a public street to any wharf or warehouse without the approval of the board of aldermen; and *provided, also*, that the rails for said tracks shall be of such pattern, suitable for railway freight cars in common use, as the board of aldermen may prescribe. Said corporation shall have all the powers and privileges and be subject to all the duties, restrictions and liabilities set forth in all general laws which now are or hereafter may be in force relating to street railway corporations, and to other railroad corporations, so far as the same may be applicable.

SECTION 2. Every railroad corporation by whose road said Union Freight Railroad passes, may, in the manner prescribed by said board of aldermen, connect its tracks with the same for the transportation of freight; and every such railroad corporation is empowered to make such connections, and in making such connections said railroad corporations shall have all the powers and be subject to all the liabilities set forth in the sixty-third chapter of the General Statutes and in the laws supplemental thereto; and it shall be the duty of said Union Freight Railroad Company to receive and deliver freight cars at each of said connections, and to haul the same over its road at its established rates. The cars on said road may be drawn during the night by steam power, subject to the regulation of said board of aldermen.

SECTION 3. Said corporation shall have the power to fix and collect such tolls for the transportation of freight

17571

as they may from time to time deem expedient: *provided*, that said rates shall only be sufficient to pay the reasonable and necessary expenses of said corporation, and to pay a dividend of five per centum semi-annually upon the actual cost of the construction and equipment of its road.

SECTION 4. Said corporation may, within its authorized limits, and for the purposes of this act, enter upon and use any part of the tracks of any other street railroad, and may suitably strengthen and improve such tracks; and if the corporations cannot agree upon the manner and conditions of such entry and use, or the compensation to be paid therefor, the same shall be determined in accordance with the provisions of the thirty-eighth section of chapter three hundred and eighty-one of the acts of the year eighteen hundred and seventy-one.

SECTION 5. The capital stock of said corporation shall not exceed the sum of five hundred thousand dollars.

SECTION 6. Said corporation shall within four months from the passage of this act, take the tracks, or any part thereof, of the Marginal Freight Railway Company, subject to the laws relating to the taking of land by railroad companies and the compensation to be made therefor.

SECTION 7. Chapter one hundred and seventy of the acts of the year eighteen hundred and sixty-seven, entitled an act to incorporate the Marginal Freight Railway Company, and so much of chapter four hundred and sixty-one of the acts of the year eighteen hundred and sixty-nine, as relates to said Marginal Freight Railway Company, are hereby repealed.

SECTION 8. The corporate powers conferred by this act shall cease, unless within one year from the date of its passage the Union Freight Railroad Company shall have constructed a track or tracks, in suitable condition for use, in accordance with the terms of this act, connecting one or more of the steam railroads on the northerly side of the city of Boston with one or more of the steam railroads on

the southerly side of said city: *provided, however*, that the board of railroad commissioners may at their discretion extend the time herein allowed for building the road for a further period not exceeding one year, on sufficient cause shown.

SECTION 9. The provisions of this act, and the franchise, rights, powers, privileges, duties and liabilities of the corporation established under this act may be altered, amended or repealed, and the legislature may annul or dissolve said corporation.

SECTION 10. This act shall take effect upon its passage.

Approved May 6, 1872.

[This is cited in 105 U.S. at page 14, as the Act of May 6, 1872.]

Acts and Resolves of Mass. 1867, c. 170:

An act to incorporate the Marginal Freight Railway Company.

Be it enacted, etc., as follows:

SECTION 1. Thomas Russell, Edward Crane, Harvey Scudder, their associates and successors, are hereby made a corporation under the name of the Marginal Freight Railway Company; with all the privileges and subject to all the duties, restrictions and liabilities set forth in the general laws which now are or may hereafter be in force relating to street railway corporations so far as they may be applicable.

SECTION 2. Said corporation, in such manner as may be prescribed and directed by the board of aldermen of the city of Boston, may construct, maintain and use a street railway with suitable turn-outs and with such tracks, not less than two, as the said board of aldermen may from time to time permit; the rails for said tracks to be of such pattern as the board of aldermen may prescribe, and which shall also be suitable for railway freight cars in common

17572

use, commencing at the Boston and Worcester Railroad tracks in Lincoln or South Street in said Boston, thence through, upon and over Lincoln or South and Beach Streets to Federal Street, or through, upon and over Lincoln, Tufts and East Streets to Federal Street; and also commencing on the freight tracks of the Old Colony and Newport Railway Company near its freight depot in said Boston, thence over, through and upon Cove and Beach Streets to Federal Street, or through, upon and over Cove and East Streets to Federal Street; thence through, upon and over Federal Street and Broad Street to Rowe's Wharf; thence through all intervening estates, at the head of Rowe's Wharf and India Wharf to India Street; thence through, upon and over India Street and through the westerly end of Central Wharf block and through, upon and over the street east of the custom-house to Commercial Street; thence through, upon and over Commercial, Causeway and Lowell Streets, or through, upon and over Commercial, Causeway, Andover, and Minot Streets to a connection with the freight tracks of the Boston and Lowell Railroad Company; with the right also to construct, use and maintain side tracks from said line above described, to any wharf or wharves or warehouses suitable for storing freight, when requested in writing so to do by a majority in interest of the owners or occupants of such wharves or warehouses; *provided, however*, that no side track shall be laid upon a public street to any wharf or warehouse without the approval of the board of aldermen.

Section 3. Said railway shall be used by said corporation for the transportation of freight only; and the cars thereon shall be drawn only by horse-power, unless the use of other power shall be sanctioned by said board of aldermen.

Section 4. Every steam railway corporation by whose road said Marginal Freight Railway passes, shall, in the manner prescribed by said board of aldermen, connect its

tracks with the same, for the transportation of freight; and every such steam railroad is empowered and required to make such connections; and in making such connections said steam railroad companies shall have all the powers and be subject to all the liabilities set forth in the sixty-third chapter of the General Statutes and in the laws supplemental thereto; and it shall be the duty of said Marginal Freight Railway Company to receive and deliver freight cars at each of said connections and haul the same over its road at their established rates.

SECTION 5. Said Marginal Freight Railway Company shall have the power to fix such tolls for the transportation of freight and the use of elevators as they may, from time to time, deem expedient: *provided*, that said rates shall only be sufficient to pay the expenses of said corporation and to pay a dividend of five per cent. semi-annually upon the capital stock of said corporation.

SECTION 6. The Commercial Freight Railway Company, incorporated by chapter two hundred and sixty-seven of the acts of the year eighteen hundred and sixty-six, is hereby authorized to unite with said Marginal Freight Railway Company, and form one corporation on such terms as said two corporations may mutually agree upon.

SECTION 7. Said corporation may within its authorized limits and for the authorized purposes of this act enter upon and use any part of the tracks of any other street railway and may so strengthen and improve such tracks as to make them suitable for the transportation of freight; and if the corporations cannot agree upon the manner and conditions of such entry and use or the compensation to be paid therefor, the same shall be determined in accordance with the provisions of the twenty-ninth section of chapter two hundred and twenty-nine of the acts of eighteen hundred and sixty-four.

SECTION 8. Said Marginal Freight Railway Company, for the convenient location and use of its tracks and to

17573

lessen and to prevent inconvenience being occasioned thereby to the public travel, are authorized to widen and alter Tufts, East and Causeway Streets; and to carry into effect the purposes of this act, shall be entitled to all the rights and privileges and shall be subject to all the duties, liabilities and restrictions set forth in the sixty-third chapter of the General Statutes and the laws supplemental thereto, so far as the same may be applicable. And any railroad corporation whose tracks are authorized to be connected with said Marginal Railway Company by this act, shall, for the purpose of properly and conveniently making such connection or for the purpose of enlarging or improving their freight or passenger accommodations in the city of Boston, have all the powers, rights and privileges and shall be subject to all the duties, liabilities and restrictions set forth in the sixty-third chapter aforesaid and the laws supplemental thereto, so far as the same may be applicable.

SECTION 9. The board of aldermen of the city of Boston may, upon the application of said Marginal Freight Railway Company, straighten the streets through which said railway is authorized to pass, and widen said streets so that they shall not be less than fifty feet in width between the curbstones; and said straightening and widening shall be made in accordance with the provisions of chapter one hundred and seventy-four of the acts of the year eighteen hundred and sixty-six; and said Marginal Freight Railway Company shall pay said city one-half of the net cost to said city of such straightening and widening.

SECTION 10. Said Marginal Freight Railway Company shall keep in repair, to the satisfaction of the superintendent of streets of the city of Boston, all the paving between the curb-stones of the streets in which their tracks shall be laid.

SECTION 11. The board of aldermen of the city of Boston, shall, upon the application of any street railway

company used for the conveyance of passengers, and owning tracks in any of the streets which said Marginal Freight Railway Company shall occupy, authorize the company so applying to remove its tracks from such streets and shall grant to said company in lieu of the tracks so removed an equally convenient location in other streets so far as the same may be consistent with the public convenience.

SECTION 22. Said Marginal Freight Railway Company is hereby authorized to erect and maintain elevators for the storage of grain, to purchase and hold such real estate as may be necessary therefor, and to collect the tolls for the use thereof provided for in section five.

SECTION 23. The capital stock of said Marginal Freight Railway Company shall not exceed one million of dollars, and shall be divided into shares of one hundred dollars each: provided, no liabilities shall be incurred by said corporation until one-half of the stock shall have been subscribed by responsible parties and twenty per cent. of the amount of such subscription shall be paid in, in cash.

SECTION 24. The Boston and Worcester Railroad Company, the Western Railroad Company, the Old Colony and Newport Railway Company, the Boston, Hartford and Erie Railroad Company, the Boston and Providence Railroad Company, the Fitchburg Railroad Company, the Boston and Maine Railroad Company, the Eastern Railroad Company and the Boston and Lowell Railroad Company are each of them authorized and shall each of them have the right to subscribe to the stock of said Marginal Freight Railway Company to an amount not exceeding five per cent. of the capital stock thereof as the amount of the same may from time to time be determined: provided, that said subscription shall be made within ninety days from such determination or increase of said capital stock. Notice of such determination or increase shall be sent to the treasurers of each of said rail-

road corporations; and upon the request of said Marginal Freight Company the said railroad corporations before named may, from time to time, make further subscriptions to said capital stock.

SECTION 15. Any freight cars arriving in Boston on either of the above mentioned railroads and containing freight destined to any other of said railroads shall be taken over said Marginal Freight Railroad and delivered to such other railroad without breaking bulk: *provided however*, that this regulation shall only apply to cars containing a full average load.

SECTION 16. This act shall be void so far as it authorizes the construction of the Marginal Freight Railway over the location of the Commercial Freight Railway or through the streets in which the said last named railway is located, also so far as relates to any rights and privileges granted to said Marginal Freight Railway by this act, upon, incident to, or connected with said last named location, unless said Marginal Freight Railway and said Commercial Freight Railway shall unite and form one corporation as they are herein authorized to do, or shall mutually agree upon the joint occupancy of said last named location, or unless said Commercial Freight Railway Company shall consent in writing that said Marginal Freight Railway Company may occupy and lay its tracks upon the location of said Commercial Freight Railway.

SECTION 17. The board of aldermen of the city of Boston shall have full power to regulate the manner and time of running the cars upon said Marginal Freight Railway.

SECTION 18. This act shall take effect as soon as it shall be accepted by the board of aldermen of the city of Boston.

Approved April 25, 1867.

Acts and Resolves of Mass., 1869, chap. 461, Sec. 5.

An act authorizing the extension of the Boston and Albany Railroad to deep water at South Boston, and for other purposes.

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SECTION 5. Said Boston and Albany Railroad Company are also authorized to purchase the whole or any part of that portion of the Boston, Hartford and Erie Railroad built or authorized to be built between the Brookline branch of said Boston and Albany Railroad and any point in the town of Woonsocket, in the state of Rhode Island; also to purchase or lease, connect with, enter upon and use, subscribe for and hold, the whole or any part of the railroads, rights, property, franchises, or capital stock, either of the Mystic River Railroad or of the Marginal Freight Railway Company, or of the South Boston Freight Railway Company, or of any one or more of said companies, or to loan money to either any one or more of said companies, or on the pledge of stock thereof, and to make such temporary or permanent contracts as shall be deemed expedient to complete or to aid in the completion of any railroad hereby authorized to be purchased. Said company may procure insurance on goods in their custody, whether as carriers or warehousemen, and issue negotiable receipts therefor. The said Marginal Freight Railway Company is hereby authorized to locate and construct its tracks on Atlantic Avenue, in the city of Boston, when opened for use. It may also contract with the city of Boston for the extension of Broad Street from its intersection with Federal Street to the intersection of Tufts and Lincoln Streets, and to lay its tracks on such extension. If no contract is made within two months from the passage of this act, the said company may take, purchase and hold a strip of land not exceeding thirty feet in width between said points. Said Boston and Albany Railroad Company may also unite and consolidate with itself in one corporation, and with their consent, the

17575

Albany and West Stockbridge Railroad Company, and the Hudson and Boston Railroad Corporation, existing in the state of New York, under the name of the Boston and Albany Railroad Company, with all the powers, privileges, rights and franchises, and subject to all the obligations and restrictions given or made and provided by chapter three hundred and forty-seven of the acts of the year eighteen hundred and fifty-five, as to the Western Railroad Corporation.